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In This Issue

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ADMINISTERED PRICES vs. PRICE WARS: CO-EXISTENCE IN BUSINESS

by

IRWIN M. STELZER*

Both politicians and economists have recently been concerned with the phenomenon known as administered prices. Generally, it is agreed that prices charged by manufacturers for many products are, within varying time limits and ranges, determined by corporate officials. Debate over the nature and extent of such pricing has raged before Congressional committees—most notably Sen. Kefauver's Antitrust & Monopoly Subcommittee of the Committee of the Judiciary. But at the same time the business press has been devoting increasing space to troubled analysis of price wars on the retail level. Thus we have an apparent difference that demands explanation.

To give one instance of price warfare, the Benrus Watch Company is reported to have expressed concern about "price chaos." It reacted to this situation by introducing a $25 watch with margins, according to Business Week, "whacked down to the point where substantial price cutting won't be feasible as in the past."

General Electric, on the other hand, reacted to price cutting by refusing to pay for cooperative advertising by dealers whose prices were below a stated floor. Significantly, the floor set up by G. E. was a percentage below suggested list prices.

Implicit in the tone of the business press is a feeling of concern about price cutting—a feeling which leads to a difference with most economists. To the latter, most price cutting is a healthy manifestation of vigorous competition. Their position is based on a simple assumption: the ultimate goal of economic activity is to maximize consumer welfare and resource use. This, therefore, should be the goal of public policy.

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Let us examine these two sets of apparent differences. First, administered prices vs. price wars; second, concern over all price cutting vs. approval of price cutting.

To the casual observer the fact that economists are concerned with administered prices while price wars are raging might well appear to indicate that the economists have once again failed to read press reports of what is going on in the real world. In fact, however, the existence of administered prices is not at all inconsistent with what seems to be a chaotic situation in many retail markets.

Perhaps the oil industry provides the best example. Despite the much publicized oil glut, United States crude oil prices have been remarkably firm. Though substantial excess capacity exists, it has caused no general crude oil price cuts. So artificial is the crude price that in June, 1953, for example, it was increased from $2.65 to $2.90 per barrel despite high inventories, considerable excess capacity and a generally bearish outlook.

A precisely opposite situation, however, characterizes retail gasoline markets, which have been the scene of some of the hottest price wars ever witnessed in the retailing field. Dealers in New Jersey felt so threatened by one of the more recent price wars in their state that they instituted their own police action against aggressive dealers.

The technique they adopted was simple: form lines of cars at the cutters' stations, purchase one gallon of gasoline and demand to have oil, water and tires checked, windows wiped, and service facilities made available to restless child passengers. This tactic so reduced sales volume as to cause compliance with "fair" price levels.

Another industry—in which the economists' concern about a high degree of concentration of production and administered prices is matched by the business press' emphasis on price cutting—is the automobile industry. With a handful of firms sharing the bulk of the market, one would expect some degree of price orderliness. Yet the *Wall Street Journal* quotes a New York Ford dealer as stating that discounts are "getting to be a 12-month thing now. It used to be that list prices held up for the first three or four months [of the model season], but nowadays people come and talk prices on opening day."

The contradiction between administered prices and price cutting is more apparent than real—for two reasons. First, retail price cutting is by no means a disorganized malfunctioning of the pricing mechanism. Rather, it is both less severe and more easily understood than

would at first appear. Second, administered prices are found in a part of industry which has been relatively free of such price weakness and readjustments as have characterized the retail level.

Much of the most publicized price cutting has been confined to list prices of commodities which at one time were fair traded. For example, Sunbeam established a fair trade retail price of $46.50 for its famous "Mixmaster." This appliance, sold to dealers at a cost of $29.70, was then being marketed in the non-fair-trade states of Texas, Missouri and Virginia (and in the District of Columbia, an area protected from fair trade laws by price-conscious Congressmen and their wives) for $34.79. A series of legal decisions in state and federal courts has, over the past 10 years, steadily decreased the geographic area in which fair trade can be applied.

More importantly, fair trade has proved difficult, if not impossible, to enforce even where it is legally defensible. As early as 1949, Consumers Union advised its members that "you can buy nationally advertised and price-fixed brands of many products at substantially (10 to 50 per cent) less than fixed prices in many large cities" in discount houses typically located "by tradition on the second floor of an office building, or out of the main shopping district . . . "

Dramatic But Limited

By 1954 the National Distribution Panel of the United States Chamber of Commerce was reporting that retail discount sales were totaling $25 billion annually, or 18 per cent of national retail volume. By 1956 *Business Week* was reporting a survey which showed that anywhere from 42 per cent to 53 per cent of air conditioners, dishwashers, floor polishers, electric ranges, refrigerators and the like were bought at discounts below list prices. As this survey excluded New York and Chicago—both big discount centers—it probably considerably understated the importance of discounting.

What must not be overlooked is that price cutting of fair traded items, while often dramatic, is limited in over-all impact. Fair traded merchandise never represented a major portion of goods sold; perhaps it was 10 per cent at its peak, according to the American Fair Trade Council.

It is true that, immediately after the Supreme Court's 1951 blow to fair trade, Macy's began selling a Toastmaster listed at $23.00 for

only $14.72, while Gimbel's marketed *From Here To Eternity* for $1.94, though its list price was $4.50. But this should not obscure the more important fact that the bulk of these stores' traffic was in goods unaffected by the spectacular—and temporary—markdowns. Macy's, for example, was at the time marketing more than 1,400 items under its own brand name; sales of privately branded television sets, for example, accounted for 75 per cent of the big store's television volume.

While discounting is widespread in the appliance field, and in some others, it does not affect the bulk of consumer goods. Further, some of the surveys cited above date back more than 10 years, indicating that such price cutting as exists is hardly of very recent vintage. Another consideration is that this price cutting stems from downward pressure on artificially created retail margins; it is merely an adjustment of fictitious list prices to levels actually prevailing.

General Electric, for example, introduced a policy of "realistic" pricing whereby prices of major appliances were to be allowed to "glide down to the more realistic level of the market place," while list prices on smaller appliances—toasters, skillets, mixers, vacuum cleaners—were cut five to three per cent "to conform to the reality of the market." It does not seem entirely appropriate to consider as chaotic a cut in a list price from $19.95 to $17.95 on a toaster which at the time is selling for $12.95 in Detroit, $12.74 in St. Louis and $12.85 in Dallas.

To the extent that real as opposed to list prices have been under pressure, that pressure is the result of broad economic forces, not a sudden merchants' penchant for anarchy. The colorful prose of the businessman is often based on the assumption that price reductions are intrinsically "unfair" and "cut-throat" and introduced by "chiselers." In fact, basic forces are in operation, some of postwar vintage, others of a longer-term nature.

Incentives to Price Cuts

The rebirth of European and Japanese industry has caused an increase in the volume of imports in many lines. These range from mass-produced, low-price items, such as blouses from Japan, to high-ticket durables, such as autos from Germany, England and France. They also include such high-fashion, high-price items as ladies' shoes from

Italy. American manufacturers, insulated from such competition for a decade, were compelled to adjust to it by altering product lines (witness the "compact" cars) or by cutting prices.

Another basic force which has affected prices and price policies is technological change, neither a new nor disturbing element. New production techniques have made possible $10 and $12 wrist watches, 25-cent ball point pens and other economy models. Such models are, of course, not perfect substitutes for their luxury counterparts. They do, nevertheless, exist as a competitive element that cannot be ignored.

Yet another basic factor of rising importance is the steadily increasing mobility of the bulk of the consuming public. The flight to the suburbs has resulted in an integration of suburban and urban retail markets. The traditional local monopolist now finds that his customers commute daily to some urban center in which iniquitous discounters offer nationally advertised, serial-numbered products to mortgage-bearing, price-conscious suburbanites.

A final force worth mentioning is the vast improvement in marketing techniques. Introduction of efficiently organized self-service establishments operating on the low-margin, high-volume principle has not been confined to the food industry. Appliance dealers, hardware firms, large drug stores and gasoline marketers have all steadily improved their sales techniques. The result is that the consumer now often has a choice between high-service, high-price establishments and self-service, low-price outlets. Previously, he bought and paid for service whether he wanted it or not.

Two conclusions, then, seem to be warranted. First, the extent of price chaos on the retail level has been overemphasized. Second, such price cutting as has occurred can be attributed to broad economic forces which, often after a wartime hiatus, are having their impact on retail markets.

Thus far, however, we have talked largely in terms of retail prices. But price cutting on the retail level can exist along with a pattern of administered prices *on the manufacturing level.* Herein lies the key to the apparent difference between the business press and the economist. Automobiles provide a perfect example. The discounts given to customers on new cars have been absorbed largely by the 45,000 dealers; the base prices charged by the handful of manufacturers are, in the words of one industry analyst, Prof. Donald A. Moore of Michigan

State College, characterized by "downward rigidity . . . during a buyer's market . . ."

Manufacturer-to-Retailer Gap

There is no indication that the discount to dealers from factory list prices has increased from its traditional 24 to 26 per cent. In fact, on so-called compact models manufacturers allow only a 20 per cent spread between factory prices to dealers and the "advertised delivered price."

At times, of course, pressures at the retail level are transmitted back down the line. In the gasoline price war which raged in Connecticut in 1950, for example, retail prices fell by five cents per gallon. The retailer bore 1.5 cents of the cut, the wholesaler one cent, and the major oil company suppliers 2.5 cents. Significantly, however, the pressure did not reach the crude oil markets.

The reason for these differences in price behavior at the retail and manufacturing levels is to be found in terms traditionally employed by economists. Many American industries are assuming the shape of an inverted pyramid. At the bottom are a very few manufacturing firms, each with considerable discretion over its prices, each acutely aware that price cuts may be met by rivals, each loath to initiate downward price adjustments to meet declining demand. The top of the inverted pyramid is often occupied by thousands of retailers, each convinced that a price cut, perhaps in the form of a "special," will yield at least temporary advantage.

Furthermore, entry into many manufacturing lines typically requires a significant capital outlay; but this is not true of the retail field. High margins attract newcomers to retailing, but each seems willing to shade those margins just a trifle.

One question remains. If retail price cutting, restricted though it may be, results in the elimination of the small retailer by the big chain store or discount house, should public policy encourage or discourage it?

Underlying much of the argument over the proper legislative program to be adopted with regard to the small businessman, and the retailer in particular, is an often unstated difference of opinion concerning the goals of our public policy. If we assume that this policy has as its sole goal the maximization of economic efficiency, many of

our public policy problems are simplified. If the big chain store or discount house is more "efficient" than the smaller retailer, then, by this standard, we would allow the latter to perish in the economic struggle.

Theoretical—and perhaps even actual—advantages would, we are told, flow from such a system of Darwinistic competition. Nevertheless, it is difficult to accept the view that our public policy should be designed to legislate such a system into being. Rather, it can be shown that the relevant declarations of public policy in this field, and our antitrust laws in particular, have social as well as economic objectives.

The problem of a possible conflict between our desire for maximum economic efficiency, on the one hand, and, on the other, our desire to avoid excessive concentration of economic (and perhaps political) power has repeatedly been considered by eminent jurists and economists. Thus, one of the nation's leading jurists—Judge Learned Hand —pointed out in an antitrust decision: "We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, *regardless of their economic results* . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, *for its own sake and in spite of possible cost,* an organization of industry in small units which can effectively compete with each other." (Emphasis added.)

In essence, this means that *even if* the preservation of small, independent businessmen involves a sacrifice of efficiency—and nowhere has such an argument been conclusively proved—such a sacrifice is a small price to pay for the social and political benefits of a society in which economic power is widely diffused.

Justice Douglas has vividly set forth the social costs which must be given weight: ". . . there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry."

Economists, too, have begun to recognize the folly of relying on some form of economic calculus to determine proper public policy. Economic considerations cannot, of course, be ignored; rather, they must be weighed in the balance with other noneconomic factors.

Would an economist's proof that the organization of German industry in the late 1930's was one which achieved an optimum use of that nation's resources—using the word "optimum" in a strictly economic sense—convince anyone that we ought to encourage similar cartelization? Or would one not be inclined to inquire into the political price paid for this assumed economic efficiency?

Professors Joel B. Dirlam and Alfred E. Kahn summed up the situation neatly when they said: "Clearly we are not devoted to a competitive system only for 'economic' reasons. It is also associated with such social and political ideals as the diffusion of private power and maximum opportunities for individual self-expression."

THE FEDERAL GOVERNMENT'S PROGRAM ON IDENTICAL BIDS

by

ROBERT A. BICKS*

I am grateful indeed for your very kind invitation to discuss with you the Federal Government's Program on Identical Bids. I shall treat first, the legislative basis for our program; second, the magnitude of the problem of identical bidding in federal procurement; third, the procedures established for reporting and utilizing identical bidding information; fourth, the results of the program as measured by antitrust actions and their measurable effects on procurement; and finally, the coordination of State and Federal action on identical bidding.

The Legislative Background

Historically, the problem of identical bidding has been with us since the enactment in 1861 of the statute making advertising for competitive bids mandatory in all Federal Government procurement.[1] In the mid-1930's however, the problem became acute as a consequence of the relaxation of antitrust prohibitions against price fixing under the National Recovery Act. A marked rise of identical bidding in federal procurement prompted the President, on June 20, 1936, to request all procurement officers of the Federal Government to report periodically to the Department of Justice identical bids received by them. This procedure was followed for eight months or more by practically all federal agencies and by some for longer periods. A tremendous volume of procurement documents was accumulated by the Justice Department, much of it so sketchy as to be worthless. No attempt was made by procurement officers to distinguish between instances in which the bidding affected procurement involving a few

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1 12 Stat. 220.

dollars and instances where the magnitude of procurement was substantial enough to warrant prosecution under the antitrust laws.[2]

This experience caused the Assistant Attorney General in charge of the Antitrust Division to comment in 1937:

> How near the vanishing point competition is in many industries may be illustrated by the experience of the Government as a purchaser in the open market. Government purchases offer the most favorable setting for the appearance of competition if it really exists. The Government must purchase only on the basis of secret competitive bids. Real competitors are protected in every way possible in the making of those bids. Yet to an increasing extent in widely separated areas bids for Government purchases are identical.[3]

Listing more than one hundred articles upon which practically identical bids had been or were then being received by the Government, the Assistant Attorney General concluded that in large sections of American industry today, competition had disappeared with disastrous effect on price disparity.[4]

The Temporary National Economic Committee, in a study of Government purchasing, concluded that the Federal Government would be benefited by a continuing and active selection, on the part of its procurement units, of identical bidding cases to be reported to the Antitrust Division and the Federal Trade Commission.[5] However, no legislative action was taken to implement this recommendation until February 19, 1948 when the Congress approved the Armed Services Procurement Act of 1947 which provided in Section 2(d) that:

> If, in the opinion of the agency head, bids received after advertising evidence any violation of the antitrust laws, he shall refer such bids to the Attorney General for appropriate action.[6]

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[2] Government Purchasing—An Economic Commentary. Monograph No. 19. Temporary National Economic Committee, 1940, p. 113.

[3] Report of the Assistant Attorney General in charge of the Antitrust Division, Annual Report of the Attorney General of the United States, fiscal year ended June 30, 1937.

[4] *Ibid.*, p. 38.

[5] TNEC Monograph No. 19, pp 114-115.

[6] Public Law 413, 80th Cong., 2nd Sess., 10 U. S. C. 2305(d).

Sixteen months later, on June 30, 1949, the Congress enacted the Federal Property and Administrative Services Act of 1949[7] which incorporated the identical reporting requirements of the Armed Services Procurement Act. Both statutes imposed upon the head of each federal agency the responsibility to refer to the Attorney General only such identical bids as in his opinion evidenced a violation of the antitrust laws. These statutes then, form the legislative base for the Government's identical bidding program.

The Magnitude of the Problem of Identical Bidding in Federal Procurement

There are no reliable current statistics by which to measure the magnitude or the specific areas of federal procurement most frequently affected by identical bidding. There are, however, indications that identical bidding consistently affects a substantial volume of all advertised procurement. In 1938, of the 330,000 bids opened, TNEC found that identical bidding was present in 23 percent, representing $87.3 million of procurement or 9.5 percent of all sealed bid purchases of 39 federal agencies.[8] The TNEC study also found that the practice of identical bidding was most prevalent in such products as motor vehicles, paper, petroleum, cement, condensed and evaporated milk, electrical machinery and clay products other than pottery. In these products identical bids were present in from 70 to 93 percent of the bid openings.[9] If the same incidence of identical bidding that was found in 1938 prevailed today, some 200,000 advertised procurements involving more than $400 millions of contracts would be affected by identical bidding.[10]

Following the approval of the Armed Services Procurement Act, the military agencies indiscriminately reported to the Attorney General substantially all identical bids and precipitated a veritable flood of

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7 Public Law 152, 81st Cong., 1st Sess., 41 U. S. C. 151(d).

8 TNEC Monograph No. 19, p. 32 and Appendix IV, Table XIX, pp. 312-313. Three types of identical bids were included, (a) all bids were identical in all respects; (b) two or more of the lowest bids were identical in all respects; and (c) two or more bids were identical in all respects, but higher than the other bids received.

9 *Ibid.*, p. 33.

10 In fiscal years 1958 and 1959, in excess of 850,000 advertised procurements valued at approximately $4.5 billions were awarded by all federal agencies.

documents, averaging almost 1,500 references per year in the first four years following enactment of the statute. Subsequently, steps taken by the Antitrust Division to enlist the cooperation of the procurement agencies to eliminate the doubtful antitrust violations and the inconsequential purchases affected by identical bidding brought a ninety percent reduction in the volume of cases referred. This decline in the volume of cases, however, was not accompanied by a reciprocal improvement in the adequacy of the antitrust information supplied.

More recently, negotiations with both the Department of Defense and General Services Administration resulted in a revision of reporting instructions designed to emphasize the reporting of information essential to the Antitrust Division in determining whether the suspect identical bids indicate a violation of the antitrust laws.

New regulations governing the method of reporting identical bids were issued by both the Armed Services and General Services Administration early in 1959. The Armed Services Procurement Regulations were revised in February 1959.[11] Contracting officers were instructed to report identical bids to the Attorney General only where there was some reason to believe that they may not have been arrived at independently. Such reports were to include copies of the bidding and contract documents; information concerning the prior experience of the agency in the procurement of the product or service affected by identical bidding; the extent to which patents or specifications restricted price competition; the nature of the pricing system employed by the bidders; the existence of a community of financial interest among the bidders; and such other information as was deemed pertinent.

A similar but more detailed set of instructions for the guidance of civilian contracting officers in reporting identical bids to the Attorney General was issued by the General Services Administration in March 1959.[12] The instructions suggested that there be transmitted to the Attorney General, in addition to the bidding documents, copies of any reports of special investigations of the suspected bidding practices; copies of correspondence relating to the factors thought to be respon-

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11 Armed Services Procurement Regulation (1955 Edition Revision) 27 February 1959, Revision No. 44.

12 41 USCA Appendix, Rules & Regulations, Sections 1-1.901 to 1-1.903.

sible for identical bidding; and data revealing the volume of purchases and the character of the bidding on prior procurements.

Since the introduction of these reporting procedures there has been a marked improvement in the quality of the identical bid references submitted. Although the volume of cases reported has not increased, there are indications that the procurement agencies now have a better grasp of their statutory responsibilities as well as a clearer view of the kind of information essential to the Antitrust Division. We too, have become aware of our own shortcomings, particularly our failure to advise the procurement agencies of enforcement actions originating in identical bid references. This lack of communication led some procurement agencies to conclude that the information furnished to us was never utilized. Consequently, there was little enthusiasm on the part of these agencies and their procurement officers for the statutory reporting requirement. We have attempted, over the past two years, promptly to inform each procurement agency of each action taken or the disposition made with respect to identical bidding reports submitted.

So much for the problems encountered in obtaining sufficiently comprehensive reports on identical bidding to be useful in antitrust enforcement. I turn next to the utilization of these reports as an instrument of antitrust enforcement. But first, it is essential to point out that, on the whole, the course of antitrust enforcement tends to be plotted by the flow of intelligence in the form of complaints from the public generally and from injured parties in particular. This stream of intelligence pinpoints the locus of competitive injury and adapts enforcement to the needs of the various sectors of our economy. The experience of federal contracting officials in procurement constitutes an important source of intelligence. Identical bidding in Government procurement is symptomatic of the avoidance of price competition and points up markets which warrant antitrust scrutiny. Of course, the absence of price competition in bidding on Government contracts does not *per se* establish a violation of the antitrust laws. In some highly concentrated markets where strong price leadership prevails, price competition may be subordinated to other forms of competition without overt agreement or concert of action among the competitors which, if present, would violate the antitrust laws.

Within the Antitrust Division all identical bid references are channeled through the Economic Section which is responsible for the

screening and selection of specific cases to be given further study by the appropriate litigating sections of the Division. This screening embraces analysis of the bidding, study of the industry's competitive structure, and price behavior and a review of the prior antitrust record of the bidders and the industry. Of course, not all identical bid reports are accorded such full examination. The selection of cases for closer scrutiny is based on such criteria as: the evidence of overt collusion revealed by the report; the volume of commerce affected; the frequency of the occurrence of identical bidding in the procurement of the product or service; the extent to which interstate commerce is involved; and the significance of the product in Federal Government procurement programs.

Each case recommended for further study by the Economic Section is reviewed by an attorney who may conclude that the case (a) warrants further investigation by the Federal Bureau of Investigation or a Federal Grand Jury; (b) lacks sufficient interstate commerce to bring the matter within the scope of the Federal Antitrust laws; or (c) lacks sufficient evidence of collusion on which to predicate a suit. Where the facts appear to indicate that the Federal Antitrust laws are not applicable the case may be referred to the Criminal Division of the Department of Justice for review under the fraud statutes. In some instances, where the commerce affected by identical bidding appears to be primarily intrastate in character, the case is brought to the attention of the Attorney General of the State in which the suspected antitrust violation occurred.

Enforcement Results Obtained From Identical Bidding Reports

Since 1950, a substantial number of antitrust cases have originated with reports of identical bidding on Government purchases, but probably the most widely publicized of these was the *Polio Vaccine* case which was filed against five corporations in May 1958.[13] Many of you are familiar with this litigation since we solicited procurement information from a large number of State and local governments. The evidence upon which the case was predicated was the persistent pattern of identical bidding by all producers and their distributors.

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[13] *U. S.* v. *Eli Lilly and Co., et al.* Cr. 173-58.

This case was initiated primarily as a result of numerous reports of identical bidding on Government procurement of polio vaccine. Unfortunately, the Court found against the Government because it had failed to sustain, beyond a reasonable doubt, that an illegal agreement was to be inferred from the circumstances of the defendants' conduct.

Another case of lesser prominence which originated with a report of identical bidding is a criminal indictment under Section 1 of the Sherman Act filed August 28, 1958 charging that three Omaha, Nebraska dairies engaged in a combination and conspiracy to eliminate and suppress competition in the sale of dairy products to the Offutt Air Force Base and the United States Veterans Hospital near Omaha.[14] In 1956 the Department of the Air Force reported to us that procurement of dairy products at Offutt Air Force Base had been affected by collusive bidding over a two-year period pointing toward the use of a system of rotation of contracts among the bidders. In April 1957 the case was referred to our Chicago Office for preliminary investigation which ultimately led to an indictment of the bidders by a grand jury in August 1958.

The *Omaha Diary* case clearly illustrates the fact, as noted in the TNEC study of Government purchasing, that favorable price results may be obtained in Governmental procurement upon the initiation of antitrust actions.[15] In this case it was observed that within a week of the conclusion of our preliminary investigation one of the defendants, whose prices had not deviated in three and one-half years of bidding on Air Force contracts, submitted a bid 8 percent below its previous bid affording the Government a saving of $4,000 on one item alone. Substantial savings on other items of dairy products also were obtained at the same time.

A suit filed last January against the two leading manufacturers of the largest selling of the mild tranquilizers, sold under the trade names Milltown and Equanil, had its genesis in identical bids reported by the Navy Department. Analysis of identical bids submitted in 1958 by the two manufacturers in response to invitations of the Navy's Military Medical Supply Agency indicated the possibility of antitrust

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14 *U. S. v. Beatrice Foods Co., et al.* Cr. 0315.

15 TNEC Monograph No. 19, pp. 99-100.

violations. A full scale investigation was authorized on the basis of this analysis which led to the filing of a complaint charging that the bidders were violating the antitrust laws by fixing prices and excluding others from the manufacture and sale of tranquilizers made with meprobamate as the sole active ingredient. The volume of sales of meprobamate tranquilizing drugs in 1958 was approximately $40 million, all of which was sold by the defendants. Federal Government purchases of meprobamate tranquilizer drugs in the first four months of 1958 were in excess of $1.5 million. Here, too, as in the *Omaha Dairy* case, initiation of the antitrust investigation brought visible price reductions. The Navy recently advised that defendants' bid prices on recent procurements have shown a decline of 13.5 percent from 1958 prices.

Probably the most significant of the antitrust cases originating in the identical bidding experiences of federal procurement agencies are the 18 criminal indictments handed down by a Philadelphia Grand Jury since February of this year. The Grand Jury investigation leading to these indictments was initiated as a result of the persistent pattern of identical bidding experienced by TVA and Bonneville Power Administration in the procurement of electrical generating, transmission and distribution equipment. Indictments returned as a result of this investigation charge a pattern of conspiracy, collusion, bid rigging and market sharing in every major sector of the electrical equipment industry which affected not only the prices paid by Federal, State and local Governments but also the prices paid by electric utility and industrial companies.

Identical bidding reports not only direct antitrust enforcement toward restraints which impose high and artificial prices upon the Government but they also point up potential suits for damages sustained by the Government. Redress for injury sustained by the Federal Government as a result of violations of the antitrust laws can now be obtained under a 1955 amendment to the Clayton Act which permits the Government to sue for actual damages.[16] In the context of this amendment, identical bidding reports take on a new and added significance since they direct attention to the specific procurement areas where the Government may have been injured as a result of antitrust violations. It is contemplated, for example, that

16 Public Law 137, 84th Cong., Ch. 283, 1st Sess. (15 USC 12 *et seq.*).

damage suits will be filed in several of the electrical cases where the volume of Government purchases was large.

You are, of course, aware that the antitrust laws permit State governments to sue for damages and in this connection it will be of particular interest to you and your State Attorneys General that we have taken steps that could materially reduce the burden of proof required in such suits. Recently, the Antitrust Division has informed defendants that consent judgments must include admissions of the allegations contained in the Government's complaint where a State or its subdivision has borne the brunt of the violation alleged and where the State has filed or indicated its intent to file damage proceedings under the antitrust laws. The adoption of this policy should substantially aid State and local governments in the litigation of suits for damages sustained as a consequence of violations of the antitrust laws.

Coordination of State and Federal Action on Identical Bidding

It is evident that a substantial volume of State procurement is affected by identical bidding, and that many of the same products and services are so affected in both State and Federal Government procurement. Furthermore, as we have observed in the electrical cases, price fixing agreements tend to operate not only in Federal Government procurement, but also in State and local government procurement where sealed bid procedures are utilized. Therefore, the detection of such illegal arrangements would be enhanced by supplementing the Federal Government system of reporting identical bids with a similar system of State government reports. This expanded reporting system would broaden the perspective of our observations and reveal more accurately the nature and scope of such conspiracies as may be found.

While I hesitate to suggest that the State governments adopt the federal system of reporting identical bids, our experience with this system offers valuable guide lines to those at the State level who may have the responsibility for developing a reporting program. In this connection members of the Antitrust Division staff, who have been most closely associated with the federal system of reporting identical bids, will be available for consultation and such assistance

as they may be in a position to offer. I am confident that your very able Committee on Competition in Government Purchasing is well equipped to develop and to assist the State governments in carrying out a sound and workable system of reporting identical bids and in coordinating State action with that of the Federal Government. In closing, let me assure you that you will have the fullest cooperation of the Antitrust Division in your search for an effective solution to the nagging problem of identical bidding which plagues so many significant sectors of government procurement.

SIMULTANEOUS PRICE FLUCTUATIONS AS A TEST OF THE SIGNIFICANCE OF PRODUCT SUBSTITUTION

by

FRANK J. KOTTKE*

A typical product has many uses; for some uses substitutes are available which are unacceptable for other uses. Not infrequently an antitrust proceeding hinges on whether the area in which goods are substitutes for each other is a sufficiently large part of the demand for each of these goods to forestall monopoly exactions from customers who insist on a particular one of them.

Stocking and Mueller in articles[1] which Lishan roundly criticized in *The Antitrust Bulletin*[2] phrased the issue in terminology familiar to economists, namely, "the coefficient of cross-elasticity of demand." In the simplest case, involving just two commodities, the cross-elasticity of demand for A is the relative change in the quantity of A which buyers will purchase at a given price in response to a small change in the same direction in the price of B. Where a monopoly of A is without significance, the cross-elasticity of demand for A is high (substantially more than one); where a monopoly of A would jeopardize the interests of persons dependent on A, the cross-elasticity of demand for A is low (not much more than zero). The approximate cross-elasticity of demand can be computed, provided accurate data are available on several price changes, as well as correlative statistics on total quantities purchased. But almost always the "cross-elasticity of demand" is used simply to describe a situation; rarely is it used to determine if the situation exists.

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ED. NOTE: The opinions expressed herein by the author are solely his own and in no manner necessarily reflect either the attitude or official views of the Federal Trade Commission.

1 George W. Stocking and Willard F. Mueller, "The Cellophane Case and the New Competition," *American Economic Review*, Vol. XLV, No. 1, March 1955, p. 29; George W. Stocking, "The Rule of Reason, Workable Competition, and Monopoly," *Yale Law Journal*, Vol. 64, No. 8, July 1955, pp. 1107, 1136.

2 John M. Lishan, "The Cellophane Case and The Cross-Elasticity of Demand," Vol. IV, No. 4, July 1959, p. 593.

The *Cellophane* case[3] turned on the factual issue, are other flexible packaging materials substitutes for cellophane in so large a portion of the uses to which cellophane is put that their competition precludes monopoly power arising from control of the supply of cellophane alone? The courts answered "yes"; Stocking and Mueller, and Stocking writing alone, answered "no." The matters which Stocking and Mueller considered persuasive were first, duPont's efforts to keep other cellophane out of the United States, and second, the considerations duPont executives took into account before raising prices in 1948. Both were inexplicable unless duPont possessed substantial monopoly power by virtue of its position in cellophane. The third matter to which Stocking and Mueller called attention was duPont's high rate of profits on cellophane over a long period of time.

Lishan criticized Stocking and Mueller for a procedure they did not attempt, measurement from price data alone of cellophane's cross-elasticity of demand. Stocking and Mueller use the concept "low cross-elasticity of demand" only to characterize the demand for cellophane. It is sufficient for them that their conclusion, to wit, that duPont possessed substantial monopoly power by virtue of its position in cellophane, is not disproved by the available information on changes in the relative prices of cellophane and other flexible wrapping materials. Lishan cannot challenge this use of price data, except perhaps to hold the work unnecessary. To be sure, Stocking writing alone goes further, asserting that the independent movements of cellophane prices *suggest*[4] that cellophane was not competitive with other flexible wrapping materials. Lishan's comment is so mild as to accept Stocking's "suggest"; to wit, "*it is conceivable* that during the period under review the cost curves of both groups of products changed in such ways as to overcome the direction of the price changes attributed by Professor Stocking to the demand side alone."

Principal interest attaches to Lishan's generalizations on methodology, which are capped by the bold conclusion that "Nothing meaningful can be stated about the cross-elasticity of demand between two goods on the sole basis of the observation of respective price

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[3] *United States v. E. I. duPont de Nemours and Company*, 118 F. Supp. 41, 351 U. S. 377.

[4] The emphasis here and at other places is supplied by the present author.

changes." There is no need to warn against exclusive reliance on comparisons of price changes to determine whether two or more goods are part of the same line of commerce. Rather, Lishan is asserting that comparisons of price changes are incompetent, that there is no justification for considering such comparisons in conjunction with the testimony of distributors and consumers, or other evidence. Here he is in error.

Lishan believes that the existence of a high positive cross-elasticity of demand between goods never can be inferred from the fact that their prices tend to move up and down in unison.[5] To be sure, with the passage of time the relative costs of the various substitutes are almost certain to change, due to improvements in technology, shifts in raw material prices, changes in wage rates, and the like. Lishan correctly points out that ultimately these changes also affect the relative prices of the substitutes. But he is wrong in believing that they generally hide a pattern of simultaneous price increases and decreases where the demands of two or more goods are linked sufficiently that control of the supply of any one of them would fail to confer significant monopoly power. In special situations this may happen. Thus a pattern of simultaneous price increases and decreases may be obscured where the production cycle is short and a frequently changing cost element (probably the price of the principal raw material) represents a very large part of the products' total cost. But in most situations where a high cross-elasticity of demand exists, the tendency for the linked demands to produce similar price fluctuations will not be obscured by changes in relative costs. Of all the possible changes in demand, or in supply,[6] or in both, the majority tend to create

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[5] References to "simultaneous" price changes and to price movements "in unison" do not imply that the changes occur the same day, although this may indeed be the case for substitutes traded on an organized commodity exchange where many traders are speculators. How long a period is meant depends on the structure of the industry, and on trade practices.

[6] Changes in cost affect prices only by changing quantities forthcoming from suppliers at a given price. Cost changes generally affect some suppliers' decisions more quickly and more seriously than they affect others. A change in supply does not usually follow every change in cost; conversely, changes in supply occur from time to time which have no relation to changes in cost. For example, a new manufacturing facility may be placed in operation, or an existing facility may be destroyed by fire.

simultaneous price increases and simultaneous price decreases. This follows inevitably from the fact that half the possible changes in supply, as well as all possible changes in demand, have this effect.

But even where an unmistakable pattern of simultaneous price fluctuations exists, it shows nothing of consequence, in Lishan's view. While such a pattern can emerge where the cross-elasticity of demand is high, it might also emerge, he believes, where there is only a modest tendency for customers to treat the goods as substitutes. This is indeed the case in those relatively few situations where three conditions are met. These conditions are, first, that the output of each of the substitutes cannot be expanded or contracted within the relevant range without changing unit costs, second, that changes in the rate of output (not simply changes in the quantity in production) follow quickly upon small[7] changes in demand, and third, that changes in supply[8] follow quickly upon small changes in unit cost. Lishan overlooks these last two conditions, but if they are not present, changes in the unit cost of any commodity A, one of a set of indifferent substitutes, following changes in A's demand induced by a change in the price of any of the other commodities in the set will rarely affect the price of A, and no pattern of simultaneous price fluctuations will result.

No great familiarity with economic life is required to establish that changes in the rate at which most goods reach the market do not quickly respond to small changes in demand,[9] and that rarely do changes in supply quickly respond to small changes in cost. Lishan's dictum that "as long as costs are not constant but are either decreasing or increasing over the relevant range, any decrease in demand for good A in response to a decrease in the price of B will result in a fall in the price of A" ignores the period of time necessary to

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[7] As the situation under discussion is that where the cross-elasticity of demand is low, the change in the demand for product A induced by a change in the price of product B is relatively small, and the amount by which producers might be induced to alter their scale of operations also is relatively small.

[8] Supply is the quantity forthcoming at a price.

[9] The principal exceptions are goods held in substantial quantities by speculators. For simultaneous price increases and decreases of such commodities to be indicative of a high cross-elasticity of demand, in the absence of a change in the supply of any substitute A following a change in the price of B, the changes in the price of A and B should tend to be of the same relative size.

accomplish these changes. But this time period is the essential difficulty in Lishan's position, for if much time is required to induce the sympathetic price change in A through the impact of the original change in the price of an indifferent substitute B, other changes in the demand or supply of either A or B will have occurred, and a pattern of simultaneous price increases and decreases will not appear.

To sum up, a pattern of simultaneous price changes rarely will occur unless the commodities in question have a high cross-elasticity of demand. Some changes in supply will alter the relative prices of substitutes, but rarely will counter price movements obscure the pattern of simultaneous price changes where goods have a high cross-elasticity of demand. Whether the demands for two or more products are in fact so closely linked as to place them in the same line of commerce should be determined like any other question of fact, in the light of all competent evidence. A pattern of simultaneous price changes is rebuttable by a showing that during the period under review most concurrent price increases involved an increase in the demand for one of the products and a fall in the supply of the other, and that most concurrent price declines involved a fall in the demand for one of the products and an increase in the supply of the other. A pattern of simultaneous price changes also is rebuttable by a showing that the products for the most part serve different uses, and that the pattern is traceable to factors which customarily affect the demands for each commodity in the same way. Similarly, the lack of a pattern of simultaneous price changes is rebuttable by a showing that in large part the commodities serve the same uses, and that aberrant price fluctuations are due to changes in supply.

Whether particular consumers treat the commodities as substitutes rarely is determinative. The issue is whether consumers of a large enough part of the output of each commodity do so that the remaining consumers are protected from monopoly exactions. Comparisons of price fluctuations are addressed directly to this issue. The *prima facie* showing of such comparisons so generally is correct that the effort of identifying the exceptions is not a serious objection to their consideration. Lishan appears to believe that where a given type of evidence considered alone may sometimes give a false impression, it never should be considered at all. Too little economic evidence would survive so harsh a doctrine to constitute a trustworthy basis for public policy.

[illegible]

THE JUDGE AND THE CIGAR LIGHTER

by

WARREN T. JESSUP*

"Died: Martin T. Manton, 66, one time senior judge of the United States Circuit Court of Appeals, of a heart ailment in Fayetteville, New York. In a trial unprecedented in the annals of the Federal judiciary . . ."

This routine obituary in TIME magazine for November 25, 1946, wrote a quiet finis to a related pair of events without parallel in American history. The first was the corruption and conviction, in 1939, of a Federal judge, Martin Manton, of New York. The second event, brought about solely by the first, was the Congressional extension of a United States patent for seven years beyond its normal seventeen year life.

The story intertwining these two events, each in its own right unprecedented in the history of American law, began on June 12, 1928, when Patent No. 1,673,727 was issued on the Ronson cigar lighter manufactured by Art Metal Works, Inc., of Newark, New Jersey.

Or maybe it really began on August 2, 1880, when a son, Martin Thomas, was born to Michael and Catherine Manton in New York City. Young Manton attended high school in Sayville, Long Island, and obtained a law degree from Columbia University in 1901. He prospered in private practice in Brooklyn and became very active in Catholic and Democratic circles. In 1911, he formed a partnership with W. Bourke Cockran, prominent Democrat of New York City.

President Wilson appointed Manton to the United States District Court in 1916. He thus became the youngest Federal judge in the United States, a distinction he retained with emphasis when he was elevated to the United States Court of Appeals for the Second Circuit, two years later. The death of Chief Justice White in 1921 left the Supreme Court without any Catholic member. The choice was narrowed to Manton and Pierce Butler of Minnesota; Butler was finally appointed, and Manton stayed on the Second Circuit, to become in

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time the senior judge in the United States, topped only by the nine justices on the Supreme Court. His political and lay church activities continued unabated, and his oratory came to be much in demand at ground breakings, cornerstone layings, dedications and Assorted Ceremonies. He spoke on The Need for Bar Reforms, and once, in 1937, even went so far as to speak before the National Republican Club meeting in New York City. In 1925, his name was mentioned as a possible mayoralty candidate. Fordham, Manhattan College, New York University and the University of Vermont conferred honorary degrees upon him.

By the early 1930's, he had become an ardent New Dealer and the "irascible domineering senior judge" of the Second Circuit (TIME: June 5, 1939).

"Large, baldish and worldly, he was no ivory-towered judge. He believed that social and economic phenomena gave life and substance to the law. Lawyers disliked his air of domineering omniscience which seemed seldom justified by his understanding of their cases, and some lawyers worried about his off-bench business affairs which were known to be extensive and intricate." (TIME: February 6, 1939) This last keyed in with some odd judicial behavior on Manton's part, notably his actions in the IRT subway rate case in 1928, the American Tobacco stockholders' suit, and the IRT receivership in 1933. In the last one, Manton expropriated the normal function of the District Court judge and insisted on personally appointing the receiver. Although technically sustained by the Supreme Court, the propriety of his conduct was so criticized, and civic pressure became so great, that he finally backed down and allowed this bit of judicial patronage to go to the District Court, as it had traditionally done.

By the late 1930's, storm clouds were gathering from three quarters—to be followed by shafts of light that were to justify those knowing Knickerbockers who dubbed him "the preying Manton." Early in 1938, New York's crusading District Attorney, Tom Dewey, began a quiet but intensive investigation into Manton's financial dealings, ostensibly to check into possible evasion of New York tax laws. That summer, Burton Heath, a self-styled "muckraker" of the New York World Telegram, began to dig into Manton's business associations with the law firm of Chadbourne, Stanchfield, and Levy, who had represented numerous clients before the judge and who had been

appointed to receivership posts in the IRT case. Finally, in January of 1939, the Department of Justice, under newly appointed Attorney General Frank Murphy, began to take an interest. Murphy had not even scratched the surface, however, when the World Telegram broke its story, on Friday, January 27. In a carefully worded but dynamite-packed article, Heath set forth the facts which he had gathered concerning the relationship among Manton, Chadbourne and Levy at the time of the IRT matter. Manton, pressed for comment, announced that he would soon issue a statement:

> "I am satisfied that my statement will satisfy the public that there is nothing wrong or immoral about it . . . I never thought it was wrong or immoral. I know that other judges have such interests."

The next day, Saturday, the World Telegram made further revelations; when queried about the charges, Manton retorted:

> "What charges? Hasn't a judge the right to buy stocks and bonds?"

The publication of Heath's story called Dewey's hand, and on Sunday, he dispatched a lengthy letter to Representative Hatton Sumners, Chairman of the House Judiciary Committee. In this letter, Dewey outlined six specific and apparently unrelated cases where there was voluminous evidence to show that Manton had conducted business dealings which were incompatible with his judicial position. Although he had previously denied it, Manton admitted, on Monday, January 30, that he had spent much of the previous Wednesday with Attorney General Murphy and had given him his promise to resign. His career was finished, but Manton maintained his judicial facade. In a prepared statement, nervously distributed to newsmen, he announced that he was resigning rather than suffer the Federal judiciary to become involved in a controversy, even though "confident as I am of my own integrity and of my ability to repel every accusation, insinuation or harmful inference". In the same press conference, Manton stated that he had gotten wind of Dewey's investigation several months before. When asked whether the investigation was in connection with State or Federal income taxes, he replied, "In connection with Mr. Dewey's ambitions".

President Roosevelt wanted to make the resignation effective immediately, but after a personal telephone plea, agreed to let the resignation take effect on February 7, in order to give Manton time to wind up some judicial matters. On Tuesday, Manton refused to see reporters or to answer questions. He did, however, receive an old friend, Monsignor William E. Cashin, who emerged after a half hour conference, commenting, "He has been a fine, clean-living man. There are times when a fellow needs a friend."

By the end of the week, Murphy and J. Edgar Hoover had personally taken over command of the investigation, which proceeded into the late spring. The trial lasted two weeks, in scorching weather which matched the judicial proceedings. The indictment charged Manton and four others with conspiracy to impede and obstruct justice and defraud the United States Government. Outlined in the indictment and subsequent trial were five specific cases in which Manton had obtained money from parties having cases before his court, in exchange for his promise of a favorable outcome. District Judge W. Calvin Chesnut, imported from Baltimore for the occasion, presided.

One of the five cases was Art Metal Works Inc. vs. Abraham and Strauss, Inc. The Art Metal litigation began in 1931 when Art Metal sued Abraham and Strauss, large New York department store, for selling cigar lighters charged to infringe the Ronson Patent No. 1,673,727. Defense of the lawsuit was immediately assumed by Evans Case Company, of North Attleboro, Massachusetts, the manufacturers of the accused lighters. In October 1931, Judge Galston of the District Court ruled that the patent was valid and had been infringed by the Evans "Automatic Lighter" but not by the Evans "Roller Bearing Lighter". Corresponding injunction and damages were decreed. Both parties appealed. Judges Manton, Swann, and Augustus Hand constituted the Appeal Court. In an opinion written by Hand, the court modified the District Court decision and ruled entirely in favor of Art Metal, to the effect that both the Automatic Lighter and the Roller Bearing Lighter infringed the Ronson patent.

Art Metal then made the mistake of waxing hyperbolic and disseminated exaggeratedly false and misleading statements concerning the effect of the Appeal Court decision. Evans applied to the Court for permission to re-open the entire case because of this in-

equitable conduct on the part of Art Metal, and to take away the judgment that Art Metal had won. On December 1, 1932, the Appeal Court, speaking through Judges Manton, Augustus Hand and Chase, permitted Evans to re-open the case.

In the meantime, Evans had brought out a new lighter, the Trig-a-Lite, and Art Metal promptly sued for infringement. On February 23, 1933, Judge Galston denied a preliminary injunction and set the case for trial the following summer.

Evans' fortune was now at a low ebb, faced with a Circuit Court injunction on two of its lighters and the possibility that the newer Trig-a-Lite might also be found to infringe. At this point, the Manton machine made its move. Alfred Reilly, president and chief stockholder of Evans, was introduced by his friend, Maurice White, to William J. Fallon, who served as intermediary between the judge and his clientele, and as "bag man" carted the money from the briber to the waiting bribee.

At Manton's trial, Reilly testified:

"We got in a cab, and Fallon said 'I understand you are in a tough spot'."

Reilly explained the status of the Art Metal litigation, to which Fallon responded that he knew Judge Manton and thought "something could be done". The next day Fallon told Reilly:

"I gave the judge the dickens about the decision last night."

Shortly thereafter Fallon asked for $200 and was thereupon introduced by Reilly to Francis E. Nolan, general manager of Evans. Nolan gave Reilly the money, and in the ensuing months purchased a box in the World Series for Judge Manton, for which he obtained reimbursement from the Evans company in the sum of $500. The $200 check, and further payments to Fallon, were made out to Allied Rediscount Corporation, completely controlled by Fallon.

On July 25, 1933, Judge Galston ruled on Evans' claim of inequitable conduct by Art Metal and held that while Art Metal's action was reprehensible and did mislead the trade, it was not such as called for the drastic remedy of completely vacating the injunction and damages previously granted, in view of the fact that Art Metal had ceased its practice and had agreed to be enjoined from future

such conduct. In the second lawsuit, Galston ruled that the Trig-a-Lite did not infringe the Ronson patent. Each party appealed from the decision which was adverse to it.

On October 12, 1933, Reilly handed Fallon a check for $3,350, on Fallon's plea that Judge Manton was in difficulties and needed money to pay his taxes. Later, from time to time, other checks were given to Fallon. Early in 1934, Fallon asked Reilly for $25,000. Reilly rejected it as impossible, whereupon Fallon queried:

"What if I got a favorable decision in the Art Metal case?"

To this Reilly conceded that it might be possible "because the bank might be more lenient" in granting a loan to Evans. To give time for the "negotiations", Manton, on his own motion, postponed the hearings on the two appeals from February to April. Fallon and Reilly then closed the deal—Evans to pay $25,000, $15,000 of which was to be a loan to Manton. Fallon insisted upon a letter to be written in ambiguous terms which he could show to Manton to assure that the $25,000 would be paid. Reilly and Nolan thereupon prepared a rambling, incoherent epistle from Reilly to Fallon, thanking Fallon for his efforts in Washington and concluding that if things worked out properly, $25,000 would be forthcoming for the "Zipper proposition". Both Reilly and Nolan later testified that the only valid part of the letter was that relating to the assurance of $25,000, the rest being pure camouflage.

After the hearing on the appeals but before decision, Reilly testified Fallon phoned him to the effect that the decision would be favorable and "that the judge was in bad circumstances for the money and wanted to know if I could not get $10,000 as quickly as possible."

On April 30, 1934, Fallon met Reilly and Nolan in the Biltmore Hotel in Providence, Rhode Island. There Fallon was handed $10,000 in cash and three post-dated checks for $500 each, together with the comment that these sums, added to the $3,350 paid in October of 1933 totalled the $15,000 promised. Fallon protested.

"The judge did not expect you to deduct the tax money."

Reilly replied that it was the best he could do, and Fallon then asked about the remaining $10,000. Reilly answered that he simply

could not get any more money, but he proposed to place Fallon on the Evans payroll at $100 per week for another year. This was done, and in fact, Fallon stayed on the Evans payroll at $100 per week for nearly three years, until the end of March, 1937. The sums paid by Reilly and Nolan to Fallon in connection with the Art Metal litigation totalled $39,850. The cash payment made in Providence was entered on the Evans records as "Prepaid royalties, Air-Flow" and was later transferred to the legal expense account.

On the day of the payoff, the decisions were handed down, both favorable to Evans. In the first case, the decision, written by Manton and concurred in by Judge Chase, reversed the District Court and held that by its inequitable conduct, Art Metal forfeited the injunction and accounting previously won. The third of the judges on the three man panel, Learned Hand, dissented, arguing: "In general, I think that the plaintiffs, through their campaign, kept within permissible limits of conduct, and while such relentless competition is not indeed an edifying spectacle, neither side appears in the record as freshly come from Arcady." In the Trig-a-Lite case, all three Appeal judges unanimously affirmed the District Court in its holding of non-infringement.

The following summer, Reilly, through Fallon's introduction, met Manton for the first time. There were numerous contacts thereafter, all social. On occasion the three played golf together, and Reilly lunched with Manton at the Lawyer's Club and went out with Manton and his wife, Fallon at times being present. No allusion was ever made to the Art Metal machinations, nor to the "payroll" sums that Fallon was then drawing.

On February 5, 1939, the Sunday following his resignation, Manton panicked into a move which was subsequently to provide the prosecution with its only direct link between him and the Reilly-Fallon deal. Returning from mass, he and Mrs. Manton stopped at the Savoy Plaza for breakfast. While waiting to be served, Manton went to the telephone and called Reilly at his North Attleboro home. Mrs. Reilly answered. When Reilly came to the phone, Manton opened:

"I understand you had Bill on the payroll?"

"Yes."

"That will be very embarrassing for me if found out, because I heard they intend to investigate and they are pretty sure to go into the Art Metal case. If they find those entries, it will be bad for me. Couldn't you pull out those pages?"

"I don't know anything about bookkeeping and wouldn't know where to begin looking for them. I don't know what to do about it."

Later that day Reilly conferred with Nolan and drove to Boston from where he telephoned Manton at his New York apartment in the Hotel Madison. Reilly asked if it was all right to talk. Manton answered, "I don't think exactly." Manton then asked Reilly for his telephone number and said that he would call him back under another name. Later in the day, the call was made, and the former conversation was repeated in substance. Manton again urged Reilly to get rid of the records, and concluded by assuring Reilly that he would "be protected by the Statute of Limitations, which is three years".

The next day, Monday, Joseph C. Allen, the Evans bookkeeper, at Reilly's direction, hired a truck and carted all Evans records prior to 1936 to the dump, where he put them to the torch. Like a Class B melodrama, FBI agents, trailing the records, came upon the bonfire just as the embers were dying. The only thing they were able to save having any bearing on the Art Metal matter was the rambling Reilly letter which mentioned the $25,000.

When he took the stand, Manton admitted knowing Fallon for twenty-five or thirty years. He denied that he ever talked to him about the Art Metal case "in any manner, shape or form". He denied ever having seen the Reilly letter. He admitted the occurrence of the Sunday phone calls, but his version of the conversations was quite different from Reilly's.

At the outset of the trial, just as counsel were clearing their throats for opening arguments, Fallon changed his plea to guilty, drawing a scowl from Manton. This left only Manton and George M. Spector to be tried. The prosecution, describing the conspiracy as "one of the fix and the double-cross" consumed seven trial days in narrating, through witnesses, five specific and unrelated legal cases in which Manton received from litigants a total of $186,146 over a period of years beginning in 1930. Four of these, including Art Metal,

were patent infringement cases. In addition, the prosecution brought out that Manton, or his corporations, had borrowed a total of $664,-000 from various litigants having cases before him. In nearly all cases, Fallon was not only the intermediary and "bag man" but also ferreted out likely prospects for Manton's unique judicial service. Through cross-examination of Manton, the prosecution showed that although ostensibly occupying a full-time job as a Federal Judge at $12,500 a year, Manton's personal financial position went from $500,000 in the red in June, 1934, to $750,000 in the black by May, 1935.

Manton's defense consisted principally of his categorical denial of all prosecution testimony, except for the documents, as to which he had an "explanation." There was also an impressive array of character witnesses, including Alfred E. Smith, John W. Davis and Emmett McCormack, president of Moore-McCormack Steamship Lines. Circuit Judges Chase, Swann, Augustus Hand, and Learned Hand, each testified that in the various cases wherein they sat with Manton, they sensed nothing in his demeanor which would indicate that he had decided any case other than on its merits. Under cross examination, Manton's manner toward the prosecutor became subtly imperious. When he rebuked his adversary to "contain yourself", he drew a reminder from Judge Chesnut that he was not in charge of the courtroom. His own lawyer had addressed him as "Judge"; Manton was obviously annoyed as the cross examiner replaced that salutation with "Mr. Witness".

Final arguments occupied the entire Saturday, June 3. In summary, the prosecution pointed out that Manton was well-to-do when appointed to the District Court in 1916. He had many business interests, which he continued from his judicial chambers, until he had assembled a complex business and financial organization. He borrowed heavily after the crash of 1929; and it was to extricate himself from these debts that he gradually slipped into the business of selling justice, until finally a pattern was established where Fallon was actually on "point" for likely prospects. In his hour and a half charge to the jury, Judge Chesnut noted:

"The charge of conspiracy on the part of a judge of a Federal Appellate Court to sell justice is hitherto unprecedented in the history

of 150 years in this nation. It is a grave charge. We cannot have good government without the true administration of justice. This is a case of primary importance to the people of the United States and you must approach your duty of reaching a verdict, leaving aside all considerations but the one you owe to the people of this country, to do justice fairly." After supper, the jury deliberated two hours and forty minutes. At 11:15 P. M., they brought in a verdict of guilty, both as to Manton and Spector. Manton walked from the courtroom aloof and unseeing, as if in a trance, past the tear-streaked gaze of his adopted son, David.

On June 20, 1939, Judge Chesnut applied the maximum sentence, $10,000 fine and two years in jail. The conviction was affirmed by a special Appeal Court panel consisting of Supreme Court Justices Stone and Sutherland and Circuit Judge Clark. The Supreme Court refused to review the decision. Midway through Manton's term in Lewisburg Penitentiary, parole was sought and denied. With automatic time off for good behavior, he left prison on October 13, 1941.

The "Nation," June 17, 1939, commented on the decision, "yet while he was so engaged, he was mentioned as a Supreme Court possibility"; and thundered, with poor prescience, "It may help to wipe away the myths upon which excessive judicial power is founded."

Losing litigants in corrupted cases hastened to seek redress. Art Metal was singularly successful. On November 20, 1939, the Second Circuit Court of Appeals (Judges Learned Hand, Augustus Hand and Patterson) reversed both of the Manton decisions. In the first case, the Appeal Court unanimously adopted the original dissenting opinion of Judge Learned Hand; the injunction and accounting were reinstated. In the second case, the Evans Trig-a-Lite was determined to be an infringement of the Ronson patent. Judge Learned Hand, adhering to his original opinion, dissented. With a veiled reminder that the Circuit Court was not a trial court, he elected to defer to Judge Galston's original opinion. Throughout the entire episode, Judge Learned Hand, through his dissenting opinions, demonstrated characteristic equanimity. He refused to be swayed either by Manton's corrupted eloquence, or by the near hysteria which followed the conviction.

Spurred by this success, Art Metal moved to Washington to recoup the "loss" of its patent. Precedent to Private Law 554, both houses of Congress adopted identical bills extending the Ronson patent for seven years, so that it would expire on June 12, 1952 instead of June 12, 1945. The rationale of the Congressional extension was that: "Before 1939, however, an infringement liability had been built up so large as to render it impossible to enforce, and any judgement which would amount to fair reinstatement of the patent owner, with respect to the 7-year period during which the protection of the patent had been lost due to fraud in the Federal appellate court itself." (Sic) Seven years was fixed upon by the following reasoning: "The net effect of the foregoing decisions was to deprive the owner of the patent herein of the right to which he was entitled for the period from December 1932 when the re-opening proceedings were authorized by the court, with Judge Manton presiding, to December 1939, when the Court, in effect, reinstated the patent." (Note, however, that there was no evidence of any improper contact between Evans and Manton until some time in 1933 when Fallon met Reilly.) In concluding, the bill noted: "Your committee are unanimously of the opinion that the equities in favor of the owner so heavily outweigh any of the arguments advanced by those who appeared in opposition to the bill, that any discussion of those arguments would serve no useful purpose. . . . Further, your committee are of the view that the enactment of this legislation is without precedent in the history of patent legislation and the committee believes that no future situation comparable will ever arise."

The Ronson patent extension is all the more remarkable because it occurred in an era when the Supreme Court was cautioning one and all that the public interest constitutes a third party in every patent lawsuit, and that the court must serve as guardian of that public interest, which is "paramount" to that of the patentee. In the Ronson case, there is no indication in either of the corrupted Manton decisions that Art Metal was precluded from enforcing the patent against the public generally; only Evans was shielded by the decisions. Yet the Congressional extension precluded the public generally from practicing the patented invention for a period of seven years greater than the normal seventeen year monopoly. From Private Law 554,

it is reasonable to infer that Congress does not share the Court's view that the rights of a patentee are inferior to those of the public.

An ancillary epilogue: Art Metal had petitioned for Supreme Court review of one of Manton's corrupted, adverse decisions; but the petition was denied, thereby allowing the decision to stand. In another of Manton's "purchased" decisions (Smith vs. Hall, 1936), the patentee-loser was unfortunately successful in obtaining a review of his case by the Supreme Court. In that case Manton's decision was reviewed and affirmed, thereby unwittingly purifying the corrupt, and precluding the patentee from taking advantage of Manton's later bribery conviction.

CONCENTRATION AND RIGIDITY IN INDUSTRY STRUCTURE

by

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A large and varied literature has grown up concerning the level of industrial concentration in the United States. At issue have been the measurement of concentration, its pattern of change over time, and its significance for the understanding of business behavior and market results. A recent note by Moses Rischin[1] examines some recent evidence and concludes that the period 1947-56 has been marked by a tendency toward increasing concentration in the economy. Because Rischin's findings are based primarily upon the data for 1947-54 published in *Concentration in American Industry*[2] it may be of interest to investigate some other implications of the material there presented. In particular, this note will examine the data in order to determine (1) whether the same or different firms accounted for the level of concentration reported in each of the two years (*i.e.*, whether the largest firms were the *same* firms in both years) and (2) whether there is any apparent connection between the rigidity of position of the largest firms and the level of or change in concentration ratios.

The changing position of individual firms within industries—although providing the principal content of industry studies, antitrust cases, and business histories—has been largely neglected in the statistical analysis of concentration data. A number of recent contributions have called attention to this neglect, and have attempted to develop revised concentration measures or auxiliary measures which take ac-

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1 "A Note on Trends in Industrial Concentration in the United States, 1948-56," *Anti-Trust Bulletin*, IV (July-August 1959) 513-20.

2 U. S. Congress, Senate, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, 85th Congress, 1st Session, 1957.

count of shifts in the positions of identified firms.[3] In the present instance, the data available permit only an enumerative measure; that is, we are able only to identify and count the industries in which one of the *n* largest firms in 1947 has been displaced by some other firm in 1954. This enumeration itself is based upon inference, and contains a margin of error; nor is it possible to infer the *number* of displacements which have occurred in each industry. However, the comparison of this limited evidence of the rigidity of position among the largest firms with the concentration data presented on a comparable basis yields some interesting, if necessarily tentative, results. At minimum, these findings suggest that the continuation of this type of analysis through succeeding Census years and the improvement of the data through special tabulations would be eminently worthwhile.

Rigidity Among the Largest Firms

Table I presents the shares of total value added by manufacture accounted for by the 50 and 100 largest manufacturing firms in 1954 and 1947 by the same companies in the alternate year. From an inspection of the table it is obvious that the same companies did not constitute the 50 and 100 largest in both years; that is, some displacement has occurred. Without knowing their numbers, one may observe that the new arrivals among the top size groups were relatively larger, both in regard to total value added by manufacture and to value added by the 50 or 100 largest firms, than those which were displaced. Of the fifty largest companies, those accounting for 1% of total value added and 5.9% of value added by the fifty largest in 1947 were displaced by firms accounting for at least 2% of total value added and at least 8.7% of value added by the fifty largest in 1954. The phrase "at least" must be stressed here, for the

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[3] S. J. Prais, "The Statistical Conditions for a Change in Business Concentration," *Review of Economics and Statistics*, XL (August 1958) 268-72; with comments by M. A. Adelman, *ibid.*, XLI (February 1959) 68-69, and I. G. Adelman and L. E. Preston, *ibid.*, XLII (February 1960) 105-08. P. E. Hart, "On Measuring Business Concentration," *Bulletin of the Oxford University Institute of Statistics*, XIX (August 1957) 225-48. Professor Norman R. Collins and the author have been engaged for some time in the development and testing of statistical techniques to deal with this problem; see our paper, "Structural Change in the Food Processing Industries," presented at the Annual Meeting of the Western Farm Economics Association, Stanford University, August 23-26, 1960 (mimeo).

following reason: if the displaced firms maintain their relative shares of total value added, then their displacement subtracts 1% from the value added by the 1947 firms which remain in 1954, thus leaving 3% to be accounted for by the displacing firms; on the other hand, if the displaced firms were all liquidated, so that they accounted for no value added in 1954, then the new appearances would account for only 2%. Because the latter alternative is unlikely, the figure of 2% understates the contribution of the displacing firms. For the 100 largest firms, displaced firms accounted for 2% of total value added in 1947 (8.7% of the value added by the 100 largest) and new appearances accounted for at least 3% of value added (10% of value added for 100 largest) in 1954.

TABLE I

Percentages of Total Value added by Manufacture Accounted for by the 50 and 100 Largest Manufacturing Companies in 1947 and 1954, with Percentages Accounted for by Identical Firms in the Other Year

Companies	*Percentages Accounted for by Identical Companies*	
	1954	1947
Largest 50 Companies, 1954	23	16
Largest 50 Companies, 1947	21	17
Largest 100 Companies, 1954	30	21
Largest 100 Companies, 1947	27	23

Source: *Concentration in American Industry*, p. 11.

The only conclusion which can be offered here is that there is at least some mobility among the largest firms in manufacturing industry, and that during the period 1947-54 the new firms appearing in the upper ranks were relatively larger, with respect both to manufacturing as a whole and to the other firms in the upper ranks, than the firms being displaced. This result need not always obtain. It is entirely possible for firms accounting for X% of value added in 1947 to be displaced by other firms accounting for the same per cent of value added in 1954; these firms would have changed size relative to each other, but the displaced and displacing groups would be of equal relative importance to all manufacturing and to the largest firms at each date. The observation here is that mobility in the largest size categories has involved the displacement of one group of firms by another group which is larger relative to all manufacturing and

relative to the other largest firms. This result should not, however, be surprising; the displaced firms may be described as being "on their way out" in 1947 and the displacing firms are growing companies which have arrived among the giants during the interim and continued to grow thereafter.

Rigidity Within Industries

A considerable tabulation of data is presented for the four and eight largest firms in SIC four-digit industries in 1947 and 1954 and for the identical firms at the alternate date. This data is available for 213 selected industries out of the 447 industries for which data are tabulated in the main study.[4] Industries were excluded from the identical-firm comparisons "because of change in industry definition between the two years or because of reclassification of large manufacturing establishments due to shifts in the products of these plants."[5] The selected industries include some coverage of each of the twenty two-digit major manufacturing industry groups; however, coverage ranges from one-fourth of the four-industry rubber group to all of the four-industry tobacco group. More important, the selected industries include a slightly larger percentage of industries with high concentration ratios than does the industry population as a whole. Of the 447-industry population, industries with four-firm concentration ratios above 50 comprise only 33% in 1947 and 32% in 1954; the comparable figures for the 213 selected industries are 43% and 42%. However, a chi-square test indicates that the difference between the two distributions is not statistically significant.

Table II has been extracted from Table 53 of the study in order to illustrate the manner in which the data are presented and the way in which the inferences of displacement were made. In order to avoid disclosure of company data, the concentration ratios of the identical large firms in the alternate years are reported by change intervals rather than presented numerically. With this limitation, however. it is still possible to infer that some displacement among the top four

[4] Although the summary tables (Tables 25-28) present data for 214 selected industries, and reference to this number is made in the text, the detailed tables (Tables 50-54) show data for only 213 industries; the apparent omission is one industry having a concentration ratio for the four largest firms in 1954 of 70-79.

[5] *Concentration in American Industry, op. cit.*, p. 195.

or eight firms in an industry has occurred during the period; it is not, however, always possible to infer that no displacement has occurred. For industry 3933, the 1947 concentration ratio for four firms was 71 and the ratio for the same firms in 1954 has increased by 3 to 7; the concentration ratio of the top four in 1954 was 76, and these four firms had increased their share of industry shipments by 8 or more since 1947. The maximum concentration ratio which these latter firms could have produced in 1947 was thus 68. Clearly, there has been some displacement of one or more of the large firms in 1947 by one or more other firms in 1954. In contrast, for industry 3321, the 1947 four-firm concentration ratio was 16 and for the same firms the ratio had increased by 8 or more by 1954; the ratio for the four largest firms in 1954 was 26 and had increased for these identical firms by 8 or more since 1947. Thus, it was clearly possible that the four top firms in 1947 remained at the top in 1954; no inference of displacement is made. It is clear that this method of inference will probably result in the omission of some displacements and thus understate the mobility of firms in some industries; however, an erroneous inference will be made only in cases where all four concentration ratios fall within a range of 5 percentage points and in consistent directions. There is, of course, no possibility that this collection of data would reveal changes of relative size *among* the top four or eight firms; mobility of this type is not indicated by any of the tabulations appearing on page 650.

The Prevalence of Rigidity

Now that the nature of the data and method of inference have been established, it is possible to turn to the questions raised at the outset. The data developed in answer to these questions are summarized in Table III.[6] To begin with, how prevalent is rigidity, as measured by this admittedly imperfect criterion, among this sample of 213 industries? In one-half (51%) of the industries, there was some displacement among the top four companies between 1947 and 1954; in 81% of the industries there was displacement among the top eight. Recalling that all of the biases in the data and the method of inference are in the direction of understating change, the conclusion

[6] The actual analysis was based upon much more detailed tabulations than those reproduced here; access to these tabulations may be had through correspondence.

that there has been a considerable displacement of firms in the largest size groups in many industries appears inescapable.

TABLE II

SIC Code	Industry	4 Largest Companies in 1947: Conc. Ratio 1947	4 Largest Companies in 1947: Increase (no sign) or Decrease (—) in concentration ratio for identical companies in *1954* by change interval	4 Largest Companies in 1954: Conc. Ratio 1954	4 Largest Companies in 1954: Increase (no sign) or Decrease (—) in concentration ratio for identical companies in *1947* by change interval
3321	Gray-iron Foundries	16	8 and over	26	8 and over
3933	Piano and Organ parts	71	3 to 7	76	8 and over

Conc. in Amer. Ind.

Source: Table #53.

Rigidity and the Level of Concentration

With some qualifications, the data indicate that rigidity is more prevalent among concentrated than among unconcentrated industries. For the four-firm concentration ratios, the industries evidencing displacement consistently show a lower incidence of high concentration ratios than the rigid industries; the percentage of mobile industries with concentration ratios above 60 is only one-half that of the rigid industries. When analyzed on a more detailed basis, it appears that the distribution of concentration ratios found among the mobile industries might be obtained from the distribution of ratios for the 213-industry group by random sampling about 50% of the time; however, the difference between the distributions of concentration ratios for the mobile and rigid industries, and between each of these distributions and the distribution of 1947 concentration ratios in the entire four-digit industry population, prove to be statistically signifi-

cant. This finding is further supported by the analysis of the eight-firm ratios. Of the 40 industries for which no displacement among the top eight firms was inferred, 35% have concentration ratios above 80 and 50% have ratios above 70. The difference between the distributions of these ratios and those of the 213-industry sample is significant at the 5% level.

TABLE III

Percentage Distribution of 213 Selected Industries by Evidence of Displacement Among the 4 and 8 Largest Firms, by 1947 Concentration Ratios and Changes in Concentration Ratios, 1947-54

	(1) *Four Largest Firms*	(2)	(3) *Eight Largest Firms*	(4)
	Displacement	No Displacement	Displacement	No Displacement
A. Percent All Industries	51	49	81	19
B. Percent Industries with 1947 Concentration Ratio of:				
(1) 60 and over	19	36	44	60
(2) 40–60	27	28	21	22
(3) under 40	54	36	35	18
(4) Total	100	100	100	100
C. Percent Industries with Change in Concentration Ratio, 1947-54 of:				
(1) +3 or more	35	22	31	33
(2) +2 to −2	36	43	43	45
(3) −3 or more	29	35	25	20
(4) not available	—	—	1	2
(5) Total	100	100	100	100

Rigidity and Changes in Concentration

The results with respect to changes in concentration are inconclusive. It might appear from the four-firm ratio comparisons (Table III, Part C, Columns 1 and 2) that the less rigid industries were characterized by increasing concentration ratios; that is, that mobility led to increasing concentration. However, the differences between the mobile and rigid industries in the four-firm comparison do not prove

to be statistically significant when analyzed in more detail; nor are they carried through to the eight-firm comparisons. Thus, it does not appear possible to infer any relationship between rigidity of position among the large firms in an industry and the direction of change in the concentration ratio on the basis of this data.

Conclusion

The results of this investigation may be summarized as follows: when the displacement of one or more of the four or eight largest firms in an industry is considered as evidence of relative size mobility, it appears that there is a significant amount of mobility among the firms in industries for which data are available, regardless of the degree of concentration, even within a period as short as seven years. There is no indication that the displacement of one or more of the largest firms is conducive to change in concentration ratios in either direction, nor to their stability. There is, however, a tendency for highly concentrated industries to experience displacement among the top firms less frequently than the population of industries as a whole. This tendency is by no means so clearly established that we infer that highly concentrated industries are almost certain to be immobile; however we can infer that they are more likely to be immobile than not. Turning the proposition around, we can also infer that an industry which has not experienced any turnover among the eight largest firms for a considerable time period is likely to be highly concentrated.

If Rischin should prove to be correct in his suggestion that concentration throughout the industrial sector is on the increase, recent experience would lead us to expect an increasing rigidity of position among the largest firms. Such an increase in rigidity may be more significant for the long-term growth of the economy, and for the development and enforcement of antitrust policy, than changes in the level of concentration itself.

ANTITRUST NEWSLETTER

Supreme Court

Dkt. 50—*Noerr Motor Freight, Inc.* v. *Eastern Railroads Presidents Conference,* 273 F. 2d 218 (3d Cir.), petition filed March 3, 1960. Petition granted April 18, 1960. Oral argument presented December 12-13, 1960.

Noerr's complaint alleged that the activities of the railroads and its public relations agency in soliciting public support for or in opposition to state legislation affecting its competitive position in the long haul freight business violated Sections 1 and 2 of the Sherman Act. The railroads counterclaimed alleging acts on the part of truckers of substantially the same character and nature. The District Court dismissed the counterclaim and found that the "fomenting of government restriction [by the railroads] * * * increasing the cost of operation and/or preventing the carrying of greater loads" [155 F. Supp. 768, 833] by the truckers amounted to a violation. An injunction restricting lobbying activities was issued and damages awarded predicated on a theory of dual injury to the truckers' good will, *i.e.,* that of their respective customers and that of the public. A divided Circuit Court affirmed on the theory that the railroads had acted with the extra-legislative purpose and effect of impairing the good will of the trucking industry. Judge Biggs dissented on the theory that legislative restraints were not such as are cognizable under the Sherman Act, irrespective of their effect. Observing that neither the District nor Circuit Court opinions specified which section had been violated, Judge Biggs questioned the constitutionality of the injunction as well as the method utilized to calculate damages.

Dkt. 73—*Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.,* 273 F. 2d 196 (7th Cir.), petition filed April 25, 1960. Certiorari granted June 6, 1960. Motion of Parmelee Transportation Co. for leave to file brief, as *amicus curiae,* granted October 10, 1960. Motion of the Solicitor General for leave to participate in oral argument, as

amicus curiae, granted October 17, 1960. Oral argument presented December 7, 1960.

The Court of Appeals affirmed the District Court's dismissal of a treble damage action based on defendant's alleged Sherman Act combination and conspiracy to control the manufacture, sale, use and installation of gas burners and furnaces on the ground that the complaint failed to allege injury to the public in the form of any appreciable lessening of competition in the sale of gas burners or furnaces, or by the public's deprivation of a product of overall superiority. Petitioner asserts that the first issue was settled by *Klors* (359 U. S. 207) and the second by *Kiefer-Stewart* (340 U. S. 211).

Dkt. 87—*Tampa Electric Company* v. *Nashville Coal Co.,* 276 F. 2d 766 (6th Cir.), petition filed May 12, 1960. Certiorari granted June 27, 1960. Oral argument presented December 15, 1960.

A divided Circuit Court affirmed the District Court's holding that a contract whereby a public utility company agreed to buy from a coal mining company "all" the coal needed by the utility for twenty years in two of its eleven units and for any other new units built at the side of the units during the first ten years of the contract, was invalid under Section 3 of the Clayton Act and therefore unenforceable. In his dissent, Judge Weicke argued that Congress had provided private parties the specific remedies of treble damages and injunction which should not be augmented by the courts' vitiation of contracts made in violation of the Clayton Act. Even if the Clayton Act were applicable to vitiate a contract in the instant type of situation, the dissenting judge was of the opinion that a requirement contract did not come within the scope of the Act unless it prohibited the buyer from dealing in the goods of anyone else and operated substantially to lessen competition or create a monopoly, neither of which conditions was met by the instant facts. Tampa contends that Section 3 has no application to contracts to "purchase"; that the relevant product market embraces Nashville's competition from all boiler fuels; that the relevant geographic market is Eastern United States and not just Florida; and that the Clayton Act was never intended to vitiate a requirement contract made by a single public utility to insure a continuing supply of boiler fuels at a constant price.

Dkt. 361—*Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 32 N. J. 459, 161 A. 2d 246 (1960), petition filed August 24, 1960. Petition denied November 7, 1960, 364 U. S. 882.

Gold's initial complaint alleged the common law tort of interference with business relations based on unfair competition, *i.e.*, Esso's offers to Gold's customers to sell at a lesser price than that at which Gold allegedly could buy. The amended complaint based its charges of unfair competition on asserted violations of the Sherman and Robinson-Patman Acts.

The New Jersey Supreme Court affirmed the Superior Court's dismissal (59 N. J. Super. 6, 157 A. 2d 30), which was predicated on the finding that the action was based solely upon federal statutes, jurisdiction of which is vested exclusively in the federal courts.

Esso contended that jurisdiction for review was lacking in that Gold had asserted rights based only on the common law of New Jersey.

Dkt. 368—*American Motor Specialties Co.* v. *F. T. C.*, 278 F. 2d 225 (2d Cir. 1960), petition filed August 30, 1960. Motion to defer consideration and petition denied November 7, 1960, 364 U. S. 884.

Petitioners sought certiorari from the Second Circuit's affirmance of a cease and desist order charging them with violations of Section 2(f) of the Clayton Act, as amended. Seventeen jobbers organized group buying organizations in 1938, ostensibly for the purpose of obtaining increased rebates from their suppliers. Members' orders were placed on the organization's forms but were not consolidated. Shipments were made directly to the individual members and not to the organization. The rebates were made to the organizations which periodically distributed same to the members in the proportion which each member's purchases bore to groups' total purchases. The pricing systems of the organizations' suppliers had previously been held violative of Section 2(a) in *Standard Motor Products* (265 F. 2d 674, *Whitaker Cable Corp.* (239 F. 2d 253) and *Moog Industries* (238 F. 2d 43, *aff'd* 355 U. S. 411). The Circuit held that the very act of combining and of thereby becoming eligible for more favorable price treatment than was available to their unorganized competitors resulted in the organizations and their members being charged with the requisite knowledge that the price differential could not be justified.

Petitioners contended that this rationale was at odds with that expressed in *Automatic Canteen* (346 U. S. 61). Pointing out that the aforementioned Section 2(a) cease and desist orders against the three suppliers did not become final until long after the discriminatory purchases involved in this action, petitioners contended that the record was barren of any evidence to indicate that they had any reason to believe that the suppliers had no defenses available to justify the alleged discriminations.

Petitioners also contended that Section 4 of the Robinson-Patman Act (15 U. S. C. 13b) insulated the organizations' activities.

Dkt. 375–*F. T. C.* v. *Dilger,* 276 F. 2d 739 (7th Cir. 1960), petition filed August 31, 1960. Petition denied November 7, 1960, 364 U. S. 882.

In an action ancillary to a Section 7 proceeding against Beatrice Foods Co., the Commission moved for an order in the District Court for the Northern District of Illinois to require Beatrice to produce those of its copies of schedules submitted to the Bureau of Census in 1954 pursuant to Section 9a of the Census Act (13 U. S. C. 9) which it retained in its files. The District Court granted the motion but the Court of Appeals reversed, holding that the Census Act prohibited such a production. The question presented was whether the Census Act precludes the Commission from subpoenaing from reporting companies–not the Census Bureau–their retained copies of schedules submitted to the Bureau pursuant to said Act. Analogizing the income tax return cases, the Commission contended that the Census Act only prohibits the disclosure by Department of Commerce personnel of reports submitted to the Census Bureau. Here, the Commission sought an order directed to the reporting company, not the Census Bureau, which would have compelled production of such copies as the reporting company might have retained, not the original which was submitted to Commerce.

The Solicitor General filed a memorandum on behalf of the Secretary of Commerce urging affirmance of the Circuit Court decision in which it was represented that "a contrary decision would have a serious effect on the operations of the Department of Commerce." Reporting companies retain copies at the Department's request in order to facilitate discussions with the Census Bureau, said the Secretary, and, hence, they too should be cloaked with the confidential

privilege. The Commission's reply to the Secretary's memorandum was to the effect that this case was controlled by existing legislation and that pleas for changes thereof were improper when directed to the judiciary.

Dkt. 385—*Niresk Industries, Inc.* v. *F. T. C.*, 278 F. 2d 337 (7th Cir. 1960), petition filed September 6, 1960. Petition denied November 7, 1960, 364 U. S. 883.

Petitioner appealed from the Circuit's affirmance of a Commission cease and desist order charging Niresk with violations of Section 5 of the FTC Act in that its advertising with respect to price and its use of the Westinghouse name and the Good Housekeeping Guaranty Seal were false and/or deceptive. Concentrating on the pricing issue, the petitioner contended that inasmuch as the only evidence before it on this issue was the price at which petitioner sold the electric frying pan, its cost to petitioner, and the testimony of two buyers from Chicago department stores of the regular price of allegedly comparable merchandise in downtown Chicago department stores, the Commission's findings were not supported by "substantial evidence."

Dkt. 435—*Dart Drug Corp. of Md.* v. *Ellis and Selma Gadol*, 222 Md. 372, 161 A. 2d (1960), petition filed September 23, 1960. Motion to dismiss granted, *per curiam*, on November 21, 1960, 364 U. S. 444.

This was an appeal from a judgment of the Maryland Court of Appeals reversing the State Circuit Court and directing the issuance of a permanent injunction.

The Gadols brought an action under the Maryland Fair Trade Act to enjoin Dart from selling branded products below the minimum retail prices established by four manufacturers. The manufacturers were not parties to the suit and none of the parties to the action had signed any fair trade contracts. The Circuit Court denied plaintiffs' prayer because of the failure of the manufacturers to seek to compel compliance. The Court of Appeals, however, reversed and held that the Fair Trade Act created a cause of action for the protection of a competing retailer from price cutting whether or not the manufacturer chose to sue.

Dart contended that the underlying rationale of all fair trade cases was the protection of manufacturers' good will and not the

protection of a competitor from the exigencies of competition. "This court cannot let stand, without review, a construction of state Fair Trade legislation which [sanctions horizontal price fixing]."

Dkt. 458—*Renfield Importers Ltd.* v. *Brandt,* 278 F. 2d 904 (8th Cir. 1960), petition filed September 30, 1960. Petition denied December 5, 1960.

Respondents herein instituted a treble damage action in St. Louis against fourteen distillers, distributors, wholesalers and retailers of liquor in which they alleged violations of the Sherman and Clayton Acts. Service on petitioner was effectuated in New York City. The district court sustained the motions of petitioner and two others to dismiss for improper venue. The circuit court dismissed the appeal because it was final as to only three of the fourteen defendants (269 F. 2d 14). Upon remand, respondents dismissed their action against all but the chosen three and, thereupon, renewed their appeal. The Eighth Circuit reversed the district court. Petitioner contended that its only connection with St. Louis was that one million dollars worth of its products were sold there annually by wholly independent wholesalers. Respondents argued, and the Circuit agreed, that "the working arrangements" between petitioner and the so-called "wholly independent wholesalers" were such as to justify a finding that the former transacted business in the relevant area within the meaning of Section 12 of the Clayton Act. See Dockets 475 and 497, *infra.*

Dkt. 475—*James B. Beam Distilling Co.* v. *Brandt,* 278 F. 2d 904 (8th Cir. 1960), petition filed October 10, 1960. Petition denied December 5, 1960.

Beam was the second of the three defendant liquor purveyors referred to in the summary of Dkt. 458, *supra.* See also Dkt. 497. The only additional questions raised by Beam concerned the propriety of Brandt taking a "voluntary nonsuit" to obtain appellate review of an otherwise non appealable interlocutory order.

Dkt. 479—*Hohensee* v. *Akron Beacon Journal Publishing Co.,* 227 F. 2d 359 (6th Cir. 1960), petition filed October 10, 1960. Petition denied December 5, 1960.

Subsequent to the granting of respondents' motions to dismiss the initial complaint for failure to state a cause of action under the antitrust laws (171 F. Supp. 90), petitioner filed a motion for leave to

file a proposed amended complaint in which he alleged a conspiracy to restrain his interstate trade in lecturing and the sale of food and other products. The district court overruled petitioner's motion for leave to file his amended complaint and dismissed the action (174 F. Supp. 450). He appealed from the Sixth Circuit's *per curiam* affirmance. Respondents contended that the single fact alleged by Hohensee was that one of the respondents threatened to throw him out of Canton, Ohio, and that even a conspiracy to realize this ambition would not run afoul of the antitrust laws. Significantly, the *Klors* opinion was not cited. Petitioner alleged further error on the basis of the district court's refusal to permit him to exercise his "right" to file the amended complaint, but respondents asserted that this objection had been waived by his failure to raise it below.

Dkt. 484—*Westinghouse Broadcasting Co.* v. *U. S. A., R. C. A., et al.,* 186 F. Supp. 776 (E. D. Pa. 1960). Appeal filed October 10, 1960. Motion to dismiss granted and the appeal dismissed on December 19, 1960. Justice Frankfurter was of the opinion that the motion to affirm should have been granted while Justices Black and Douglas were of the opinion that probable jurisdiction should have been noted.

This was a direct appeal from a district court judgment denying intervention in a civil antitrust suit brought by the United States.

Pursuant to the terms of a consent decree (1959 Trade Cases, ¶69,459), NBC notified the Department of Justice of its intention to exchange certain television stations. When the Department formally notified the district court that it did not intend to challenge the proposed action, Westinghouse unsuccessfully sought to intervene. The court held that Westinghouse could not intervene as a matter of right and, in view of the Government's opposition, it would not allow discretionary intervention even if it could. Section VIII of the consent decree provided that jurisdiction would be retained "for the purpose of enabling any of the parties . . . *and no one else,* to apply. . . ." Petitioner asserted that it had a "right" to intervene and that the court erred in holding itself devoid of jurisdiction by virtue of the wording of Section VIII of the decree.

Dkt. 497—*Julius Wile Sons & Co.* v. *Brandt,* 278 F. 2d 904 (8th Cir. 1960), petition filed October 20, 1960. Petition denied December 5, 1960.

Wile was the third of the three liquor purveyors referred to in the summary of Dkt. 458, *supra*. See also Dkt. 475.

Dkt. 499—*Flotill Products* v. *Federal Trade Commission,* 278 F. 2d 850 (9th Cir. 1960), petition filed October 21, 1960. Petition denied December 12, 1960.

Subsequent to the issuance of a complaint charging violations of the Robinson-Patman Act and to the appointment of a hearing examiner, the Commission issued a subpoena which Flotill characterized as "investigational" and which was returnable before the examiner in an adjudicatory proceeding. Enforcement proceedings were instituted when Flotill declined to comply and, although petitioner claimed that the district court expressly characterized the subpoena as "investigational," petitioner was ordered to comply with the subpoena as redrafted by the court. On appeal, the Circuit took the position that Section 9 of the Federal Trade Commission Act empowered the judiciary to assist the Commission and that once the order of the trial judge was entered, the hearing examiner's subpoena—together with any alleged defects or irregularities therein—was superseded and became inoperative. What remained, the Commission contended, was a perfectly unobjectionable district court order.

Dkt. 501—*Binks Manufacturing Co.* v. *Ransburg-Electro-Carting Corp.,* 281 F. 2d 252 (7th Cir. 1960), petition filed October 24, 1960. Petition granted December 19, 1960.

In the face of Ransburg's counterclaim for infringement, Binks withdrew its declaratory judgment action, challenged validity of the patents in its answer and alleged antitrust violations, unfair competition and misuse in its cross-counterclaim. The district court held the patents valid and infringed and dismissed the cross-counterclaim. In seeking review, petitioner contends that respondent tied equipment leases in with its patent licenses, required such lessees to take a license under a package of unwanted patents, and compelled such licensees to cross-license future improvements. Respondent denies each of these claims and contends that only by disregarding the express findings of the lower courts can petitioner's view of the case be supported. "The Petition makes no showing of error in the findings below, much less the very obvious and exceptional showing of error."

Dkt. 526—*United States* v. *Parke, Davis & Co.,* 1960 Trade Cases, ¶69,776 (D. C. D. C.), appeal filed November 10, 1960.

The Government appeals from the district court's refusal to adjudicate, in conformity with the Supreme Court's holding (362 U. S. 29), that Parke, Davis had violated Section 1 of the Sherman Act. After the Supreme Court's reversal of the district court's dismissal of the Government's complaint in the underlying action, Parke, Davis offered evidence to the district court designed to show that there was no need for the relief sought in the complaint, *viz.,* an injunction. The operative portion of the resulting order was: "ORDERED that the injunctive relief sought by the Plaintiff is denied." The Government appeals only from the refusal to adjudicate liability, not with respect to the denial of injunctive relief. The continued effectiveness of private enforcement of the antitrust laws as well as of its own enforcement powers, asserts the Government, are placed in jeopardy by this decision. Appellee asserts that the Government failed properly to raise in the proceedings below the only point presented on appeal.

Dkt. 556—*Turpentine & Rosin Factors Inc.* v. *United States,* 1960 Trade Cases, ¶69,866 (D. Ga.), petition filed November 30, 1960.

Appellant seeks review of the district court's refusal to modify a provision in a 1951 consent decree (1951 Trade Cases, ¶62,929), requiring it to furnish certain pricing information to the Department of Agriculture. Appellant contends that the purpose of this provision was to nullify the effects of an alleged price-stabilizing scheme effectuated through a trade association and that since said association and all other defendant competitors have passed out of existence, the provision in question has outlived its usefulness and, in fact, now works a competitive hardship on it. The Government cites *Swift* (286 U. S. 106) in opposition.

Dkt. 575—*Kentucky Rural Electric Cooperative Corp.* v. *Moloney Electric Co.,* 282 F. 2d 481 (6th Cir. 1960), petition filed December 9, 1960.

When respondent cancelled its distributorship agreement with petitioner pursuant to the terms of which the former sold certain of the latter's electrical equipment to its members, KYREEC instituted a treble damage action in which it alleged price discriminations in violation of Section 2(a) of the Clayton Act, as amended. Moloney ultimately asserted in its amended answer that its payments of up-

wards of $350,000 to the cooperative for services rendered over a ten-year period were unlawful under Section 2(c) of the Act and rendered the contract unenforceable. The district (175 F. Supp. 250) and Circuit Courts agreed with Moloney and KYREEC seeks review.

Department of Justice Activity

U. S. v. *General Dynamics Corp., et al.* (U. S. D. C. S. D. N. Y., Petition, Dec. 22, 1960).

Attorney General William P. Rogers announced the filing in New York of a petition charging four major manufacturers of carbon dioxide with criminal contempt of a 1952 antitrust judgment which barred price-fixing and other restrictive activities.

General Dynamics Corporation; Air Reduction Company, Inc.; Olin Mathieson Chemical Corporation, all of New York, and Chemetron Corporation of Chicago, were named as respondents.

According to the petition, the respondents violated specific prohibitions of the 1952 judgment by engaging in a conspiracy, since 1953, to fix and maintain prices of Carbon Dioxide. The petition also charges that respondents General Dynamics Corporation, Air Reduction Company, Inc. and Chemetron Corporation and individual respondents Cusack and Mathey have violated the judgment by interfering with business practices and policies of other firms and persons engaged in the manufacture, distribution and sale of Carbon Dioxide in the United States.

Carbon Dioxide, sold as dry ice, in liquid form or as a gas, is used for refrigeration of food, production of fuel for rockets and missiles, environmental testing of aircraft, charging of fire extinguishers, and carbonation of beverages. It is also used in the processing of rubber, metals, chemicals and plastics.

More than 850,000 tons of Carbon Dioxide, valued in excess of $65,000,000 was produced in the United States in 1959. For that period General Dynamics accounted for 32 percent of total industry shipments, Air Reduction Company, 26 percent, Chemetron Corporation 18 percent and Olin Mathieson 7 percent.

The Government petition asks that the court order the respondents to show cause why they should not be held in criminal contempt of court.

The 1952 consent judgment named the Liquid Carbonic Corporation, et al., but General Dynamics Corporation was named a respondent in the contempt proceedings as successor in interest to Liquid Carbonic Corporation because of a 1957 merger.

U. S. v. *Northern California Pharmaceutical Ass'n* (U. S. D. C. N. D. Calif., Complaint, Dec. 28, 1960).

Attorney General William P. Rogers announced the filing in the United States District Court for the Northern District of California of a civil antitrust complaint against the Northern California Pharmaceutical Association, which has its offices in San Francisco.

According to the complaint, the defendant Association, together with its officers, directors and members and with various county pharmaceutical associations, engaged in an unlawful conspiracy in restraint of interstate commerce in prescription drugs, in violation of Section 1 of the Sherman Antitrust Act. That conspiracy, it is alleged in the complaint, has consisted of agreements (a) to establish and maintain uniform prices for prescription drugs sold to consumers in northern California; (b) to adopt a prescription pricing schedule and revisions thereof formulated by defendant Association's pricing committee; (c) to publish and distribute that pricing schedule to members of the defendant Association; and (d) to urge and induce said members to fix uniform retail prices for prescription drugs by using that schedule and revisions thereof.

According to the complaint, the effects resulting from said conspiracy are that price competition in the sale of prescription drugs has been suppressed and eliminated in northern California and that consumers in northern California have been charged with high, arbitrary, and noncompetitive prices for prescription drugs.

It is alleged that over 75 percent of all pharmacies in northern California are owned by members of the defendant Association, and that their annual sales of prescription drugs exceed $75,000,000. Most of those drugs are compounded by manufacturers and require no further compounding by the pharmacists who dispense them according to prescriptions. Prescription drugs are not sold under trademarks or brand names of manufacturers.

A criminal indictment against the same Association and against the individual who compiled the price schedule was returned by a San Francisco Grand Jury on December 14, 1960. The charges in

that criminal indictment are substantially similar to those in this civil complaint. In the civil case the Government seeks injunctive relief against continuation of the alleged conspiracy in the future, and against certain practices relating to pricing of prescription drugs.

U. S. v. *The General Fireproofing Co., et al.* (U. S. D. C. W. D. N. Y., Complaints, Dec. 28, 1960).

Attorney General William P. Rogers announced the filing of three civil complaints in the Federal District Court in Buffalo, New York, charging the major manufacturers of metal office furniture with violations of the antitrust laws. The allegations in the complaints parallel charges made in indictments returned in Buffalo on December 7, 1960. The civil actions ask injunctions to prevent continuation of the alleged illegal practices.

Assistant Attorney General Robert A. Bicks, in charge of the Justice Department's Antitrust Division, said that "the injunctive relief requested is designed to remedy the suppression of price competition in the metal office furniture industry and to provide conditions under which prices and other terms of sale may be determined by the free play of competition."

The defendants in the major complaint are: The General Fireproofing Company, Youngstown, Ohio; The Globe-Wernicke Company, Norwood, Ohio; The Shaw-Walker Company, Muskegon, Mich.; The Yawman and Erbe Manufacturing Company, Rochester, N. Y.; Art Metal, Incorporated, Jamestown, N. Y.; Steelcase, Inc., Grand Rapids, Mich.; Sperry Rand Corporation, New York, N. Y.; and All-Steel Equipment, Inc., Aurora, Ill.

The complaint stated that the defendants are the principal manufacturers of metal office furniture in the United States. Total sales of this type of furniture in 1958 were approximately $210,000,000, of which aggregate factory sales of the defendants totalled approximately $114,000,000.

Beginning some time prior to 1954, the complaint alleged, and continuing at least through January 1, 1960, defendants engaged in a conspiracy to fix and stabilize prices "in unreasonable restraint" of trade and commerce in metal office furniture, in violation of the Sherman Act, the basic antitrust law. It was alleged that the members of the conspiracy agreed, among other things, to:

Use a uniform zone delivered pricing system, dividing the country into an Eastern zone, a Central and Southern zone, and a Western zone;

Establish consumer list prices for sales of metal office furniture in Zone 1 (Eastern) and determine the sales prices for the other zones by applying stated percentage differentials;

Stabilize zone delivered prices by making price changes only pursuant to agreement, by creating a limited number of standard colors and making extra charge for any color other than those listed as standard, and by making an extra charge for laminated plastic tops.

The effects of this assertedly illegal agreement, according to the complaint, have been to suppress price competition in the sale and distribution of metal office furniture and to deprive independent dealers and the consuming public of the benefits of free and open competition.

A permanent injunction to restrain each of the defendants, or their successors, from continuing the present conspiracy or engaging in any future conspiracy "having a similar purpose or effect" was asked in the complaint. The Court was also asked to enjoin the defendants perpetually from communicating to any other vendor of metal office furniture, prior to the official opening of a bid submitted to any governmental agency, any information pertaining to such bids. In addition, the complaint asks that the Court order each defendant to issue price lists prepared independently, which price lists must include f.o.b. prices for metal office furniture products.

A second complaint named as defendants Sperry Rand Corporation, The General Fireproofing Company, Steelcase, Inc., Diebold, Incorporated, of Canton, Ohio, and Art Metal, Incorporated. It charged them with an unlawful conspiracy since prior to 1954 to eliminate and suppress competition in the sale of fire resisting filing cabinets and accessories by fixing prices, allocating business and maintaining retail prices. Injunctive relief was sought similar to that asked in the complaint against the major dealers in metal office furniture. In addition, the Court was asked to cancel all of the defendants' Fair Trade agreements and enjoin use of Fair Trade contracts in sales of fire resisting filing cabinets for a period of at least five years.

Annual total sales of fire resisting filing cabinets and accessories, the complaint stated, exceed $12,000,000, with sales of the defendant corporations accounting for approximately $4,500,000 of this total.

The third complaint charged The Shaw-Walker Company and Sperry Rand Corporation, the two largest manufacturers of fire resisting filing cabinets, in the United States, with a separate conspiracy to restrain interstate trade and commerce in these products by agreeing to eliminate price competition and allocate sales between themselves. Injunctions similar to those sought in the other two cases were asked.

U. S. v. *Durable Building Materials Council, Inc., et al.* (U. S. D. C. W. D. Tenn., Consent Judgment, Jan. 5, 1961).

Attorney General William P. Rogers announced entry of consent judgments at Memphis, Tennessee, terminating two civil antitrust cases against a trade association and eight building material dealers charged with Sherman Antitrust Act violations in the sale and distribution of cement and ready mixed concrete in Memphis.

Annual sales of cement and ready mixed concrete affected by the violations were alleged to total approximately $8,700,000 in the Memphis area.

Defendants in the cement case were: Durable Building Materials Council, Inc.; Fischer Lime & Cement Company; Fay Realty Company; Crump Lime and Cement Company; Standard Builders Supplies, Inc.; John A. Denie's Sons Company; Fant & Anderson Company; and Memphis Lime & Cement Company.

Defendants were charged with conspiring to: fix prices "since at least 1955" for the sale of cement; quote identical prices to the City of Memphis, Memphis City Schools, Shelby County Board of Education and other governmental agencies.

The complaint also charged the conspiracy included publication of cement price lists through the Materials Council, and establishment of a bid registration system in the Council on bids submitted to Government agencies.

It was alleged that the three defendants conspired to fix, stabilize and control prices for the sale and distribution of ready mixed concrete in the Memphis area since 1958.

According to the complaints, effects of the practices were to increase the price of cement and ready mixed concrete, and to eliminate

competition among building material dealers in the Memphis area in the sale and distribution of those products.

Consent judgments entered in the cases enjoin defendants from resuming or continuing the challenged practices. Each defendant is also required to withdraw its old price list and to issue new prices based on its own costs.

The judgments also require each defendant, for five years, must submit a sworn statement with each bid to any governmental agency that the prices quoted were arrived at without collusion or communication with any competitor.

The cement case judgment also requires dissolution of the trade association.

U. S. v. *Stupp Bros. Bridge & Iron Co., et al.* (U. S. D. C. W. D. Mo., Indict., Jan. 5, 1961).

Attorney General William P. Rogers announced the return of an indictment by a Federal Grand Jury at St. Louis, Mo., charging seven firms with violating the Sherman Antitrust Act through a conspiracy to eliminate competition in the sale of fabricated steel used in bridge construction projects of the Missouri State Highway Commission.

The indictment named as defendants: Stupp Bros. Bridge & Iron Co., St. Louis, Mo.; Wilmar Steel Products Company, St. Louis, Mo.; St. Joseph Structural Steel Company, St. Joseph, Mo.; Kansas City Structural Steel Company, Kansas City, Mo.; Missouri Valley Steel, Incorporated, Leavenworth, Kansas; A. J. Industries, Inc., Los Angeles, California; and Havens Structural Steel Company, Kansas City, Mo.

The indictment charged the defendants conspired to restrain interstate trade by agreeing to divide the State of Missouri into an eastern and a western territory for the purpose of allocating business among themselves.

The indictment alleged that under that agreement, Stupp and Wilmar would refrain from bidding to supply steel for bridge jobs in the western territory while St. Joseph Structural Steel, Kansas City Structural Steel, Missouri Valley and Havens would refrain from bidding on steel for bridge jobs in the eastern territory.

It was charged further that Stupp, Wilmar and A. J. Industries agreed to allocate jobs in the eastern territory and in bidding on such jobs would lower or raise their bids in such a manner as to effectuate the allocation.

St. Joseph Structural Steel; Kansas City Structural Steel; Missouri Valley, A. J. Industries, and Havens were charged with similar practices in the western territory.

The indictment alleged that fabricated steel purchased from suppliers by the Missouri State Highway Commission for bridge projects between January, 1954 and July, 1959 amounted to more than $23,-000,000, and more than 87 percent of that steel was purchased from or through the defendants.

The indictment also charged that most of the bridges for which the steel was purchased are located on interstate highways or serve interstate motor vehicle traffic and were constructed with funds supplied in part by the Federal Government.

The Government alleged that the conspiracy suppressed competitive bidding in the sale of fabricated steel for Missouri bridge projects and deprived the State of Missouri and the Federal Government of the benefits of price competition on bridge projects for which both the state and federal government furnish funds.

If convicted, each defendant faces a maximum fine of $50,000 (under 15 U. S. C. sec. 1).

U. S. v. *Olin Mathieson Chemical Corp.* (U. S. D. C. D. Del., Complaint, Jan. 6, 1961).

Attorney General William P. Rogers announced filing of the first civil antitrust complaint in which the Clayton Act has been used to challenge the increasingly popular "joint venture" technique under which competing companies may combine to avoid, restrain or lessen competition.

The complaint, filed in United States District Court at Wilmington, Delaware, named as defendants Pennsalt Chemicals Corporation of Philadelphia, Olin Mathieson Chemical Corporation of New York and their newly created joint company, Penn-Olin Chemical Company, a Delaware corporation. One of Penn-Olin's products is a chemical used in the production of propellant fuels for rockets and missiles.

Assistant Attorney General Robert A. Bicks, head of the Antitrust Division of the Department of Justice, said in describing the case:

> "Joint ventures have become an increasingly popular means by which two or more companies may, without completely merging, pool their capital or technology to establish a new business entity. Whenever joint venturers are competitors in any line of business, their agreement and combination as well as acquisition of stock or assets, remain fully subject to the application of traditional Sherman and Clayton Act principles.
>
> There is no question that Section 7 of the Clayton Act was designed by Congress to halt all mergers and acquisitions, regardless of form, having the proscribed adverse effects on competition."

He added:

> "The Penn-Olin complaint, which represents the department's first challenge under Section 7 of the Clayton Act to the acquisition by joint venturers of stock in a corporation of their own creation, highlights the anticompetitive consequences which may flow when substantial competitors merge part of their resources to form a new enterprise."

The Government complaint against Penn-Olin, filed under Section 7 of the Clayton Act and Section 1 of the Sherman Act, alleged that Olin Mathieson, one of the 41 largest industrial corporations in the United States and Pennsalt, a large chemical company, compete with each other in the production and sale of chemicals amounting to nearly $90,000,000.

According to the complaint, Olin Mathieson and Pennsalt entered into an agreement in February, 1960, providing for establishment of Penn-Olin as their joint company at Calvert City, Kentucky, to build and operate a $6,500,000 plant for the production and sale of sodium chlorate and other chemicals.

Sodium chlorate is used in the bleaching of pulp and paper and in the production of solid propellant fuels for rockets and missiles. The complaint asserts that the sodium chlorate industry is highly concentrated with Pennsalt and two other companies presently accounting for virtually all of the sodium chlorate produced in the United States.

The complaint points out that Olin Mathieson, while not a producer, is a leading customer and seller of sodium chlorate and occupies a leading position in the technology of sodium chlorate applications.

The complaint states that Olin Mathieson's patented process for generating chlorine dioxide from sodium chlorate for pulp and paper bleaching purposes is reported as being used in more than 20 of 55 chlorine dioxide generation plants in North America.

It was further alleged that following Penn-Olin's incorporation in Delaware last February, its common stock was issued in equal shares to Pennsalt and Olin Mathieson, and officials of the two parent companies have been made the officers and directors of Penn-Olin.

In addition, according to the complaint, Pennsalt and Olin Mathieson have agreed to disclose to Penn-Olin all technical and operating information relating to its operations or contemplated operations which either company possesses or may develop through 1964.

The Government charges that the concurrent acquisitions of Penn-Olin's stock may substantially lessen competition or tend to create a monopoly in the production and sale of sodium chlorate and other chemicals in violation of Section 7 of the Clayton Act. It is further charged that the contract by which the two firms established Penn-Olin, and the combination in which the three companies have pooled their resources are in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

Effects of the violations, alleged in the complaint include:

Elimination of potential competition between Pennsalt and Olin Mathieson in the production of sodium chlorate; substantial lessening of actual and potential competition between Pennsalt and Olin Mathieson in production and sale of other chemicals; preservation of existing concentration and the enhancement of barriers to the entry of newcomers in the sodium chlorate industry; elimination of Olin Mathieson as an independent customer for sodium chlorate produced by competitors of Pennsalt; and the encouragement of competitors in the chemical and other industries to participate in joint ventures as a means of avoiding or lessening competition.

The complaint asserts that the violations and anticompetitive effects will continue unless the Penn-Olin joint venture is declared unlawful and injunctive relief is granted against it.

U. S. v. *Greater Buffalo Press, Inc., et al.* (U. S. D. C. W. D. N. Y., Complaint, Jan. 6, 1961).

Attorney General William P. Rogers announced filing of a civil antitrust complaint in Buffalo, New York, charging six defendants with antitrust violations in the printing of Sunday newspaper color comic supplements in the United States.

The complaint named as defendants: Greater Buffalo Press, Inc., Buffalo, New York; Hearst Corporation, New York; Newspaper Enterprise Association, Cleveland, Ohio; International Color Printing Company, Wilkes Barre, Pa.; Southwest Color Printing Corporation, Lufkin, Texas; and the Dixie Color Printing Corporation, Sylacauga, Alabama.

Greater Buffalo was described as the foremost color printer of Sunday newspaper supplements in the United States. Newspaper Enterprise is a subsidiary of the E. W. Scripps Company, Inc., of Cincinnati, and International Color, Southwest Color and Dixie Color are subsidiaries of Greater Buffalo. Dixie and Southwest were named defendants only for purposes of relief sought by the Government.

Eastern Color Printing Company of Waterbury, Connecticut, was named as a co-conspirator but not as a defendant.

Four offenses are charged in the complaint. The first is an alleged conspiracy among Greater Buffalo, King Features Syndicate (a division of Hearst), and Newspaper Enterprise to suppress competition through an agreement not to compete among themselves. The second charges conspiracy among the three to monopolize the Sunday supplement market. In that connection, the Government charged that the three defendants account for approximately 80% of the units of color comic supplements sold during the period from 1954 to date.

The third offense charged Greater Buffalo with violating the antimerger provision of the Clayton Act by acquiring the International Color Printing Company and its plant at Wilkes Barre, Pa., International Color, both before and after its acquisition by Greater Buffalo printed color supplements solely for King Features Syndicate. It was charged King encouraged and assisted Greater Buffalo in its purchase of International Color, which enabled Greater Buffalo to increase its share of the market from approximately 42% to approximately 80%. International is charged with violating Section 7 of the Clayton Act.

The fourth offense charges King Features and Newspaper Enterprise with selling comic features at discounts on the condition that the newspaper shall not deal in the color comic services offered or sold by competing syndicates.

The complaint charges that many newspapers in the United States have been denied the advantages of competitive bidding for the printing of their newspaper color supplements because of the actions of defendants.

The action seeks a decree which will compel Greater Buffalo to divest its printing plants at Lufkin, Texas, and Sylacauga, Alabama as well as ownership of International Color Printing Company. The complaint also asks the court to prohibit the syndicate defendants from selling comic features on condition that the newspaper purchasers refuse to deal in color comic supplement services offered by competitors.

U. S. v. *Western Reinforcing Steel Fabricators Ass'n, et al.* (U. S. D. C. N. D. Cal., Consent Judgments, Jan. 17, 1961).

Attorney General William P. Rogers announced the entry of consent judgments in U. S. District Court at San Francisco terminating the Government's civil antitrust suit against 13 of 18 defendants charged in November, 1959 with conspiring to eliminate competition in the sale, distribution and fabrication of concrete reinforcing bars in seven western states.

Two judgments filed in the San Francisco court concluded the Government's case against the following defendants: Western Reinforcing Steel Fabricators Association, Oakland, California; Blue Diamond Corporation, Los Angeles, California; Ceco Steel Products Corporation, Chicago, Illinois; Gilmore-Skoubye Steel Contractors, Oakland, California; Herrick Iron Works, Hayward, California; F. A. Klinger, Inc., Stockton, California; Meehleis Steel Company, Vernon, California; Pittsburgh-Des Moines Steel Company, Pittsburgh, Pennsylvania; Rutherford & Skoubye, Inc., of Los Angeles, Downey, California; Joseph T. Ryerson & Son, Inc., Chicago, Illinois; San Jose Steel Company, Inc., San Jose, California; Soule's Steel Company, San Francisco, California; and Southwest Steel Rolling Mills, Los Angeles, California.

The Government alleged that practices charged in the complaint had been carried out in Arizona, California, Idaho, Nevada, Oregon, Utah and Washington.

The judgments entered were designed to prevent the consenting defendants from continuing the restrictive practices and to restore competition in the sale, distribution and fabricating of concrete reinforcing bars.

Under the judgments the consenting defendants are enjoined from agreeing to allocate and divide fabrication jobs among fabricators; to fix uniform interest rates; to buy or refrain from buying reinforcing bars in foreign countries, and to prevent any steel mill from selling reinforcing bars to general contractors or steel warehouses, or requiring any steel mill to limit its sales of reinforcing bars to them.

The judgments also enjoin defendants from urging any steel mill to refrain from selling reinforcing bars to general contractors or steel warehouses and from reporting to any steel mill that reinforcing bars had been resold by others to a general contractor.

The consent judgment filed against Southwest Steel Rolling Mills provides that under certain conditions, the mill must sell reinforcing bars to general contractors and to steel warehouses under the same terms and conditions that sales are made to reinforcing bar fabricators. However, this provision is not to become effective until a similar judgment is entered against certain other mills.

The Government will proceed to trial against the remaining defendants which include: Bethlehem Pacific Coast Steel Corporation, San Francisco, California; Bethlehem Steel Company, Bethlehem, Pennsylvania; Judson Steel Corporation, Emeryville, California; Pacific States Steel Corporation, Niles, California; and United States Steel Corporation, Pittsburgh, Pennsylvania.

U. S. v. *Allen-Bradley Co., et al.* (U. S. D. C. W. D. Ohio, Indict., Jan. 19, 1961).

Attorney General William P. Rogers announced the return of an indictment by a federal grand jury at Dayton, Ohio, charging four manufacturers and two individuals with Sherman Antitrust Act violations through a conspiracy to fix prices in the sale of composition electrical resistors to equipment manufacturers and to the Armed Forces.

A companion civil case was filed at the same time naming only the four companies as defendants.

Defendants named in the indictment were: Allen-Bradley Company, Milwaukee, Wisconsin; Stackpole Carbon Company, St. Marys,

Pennsylvania; Speer Carbon Company, St. Marys, Pennsylvania; International Resistance Company, Philadelphia, Pennsylvania; George W. Vater, Sales Manager of the Electronic Components Division of Allen-Bradley; and Edward W. Butler, Vice-President of Marketing of Speer Carbon Company.

Composition resistors are used in the construction and operation of radio, television and other communications equipment.

The indictment charges that sales of composition resistors by the defendants in 1959 totaled more than $43,000,000, including sales to the Air Force at Gentile Air Force Station, Wright-Patterson Air Force Depot at Dayton, Ohio.

The indictment charges that the defendants, beginning at least as early as 1955, conspired to fix and maintain uniform prices for the sale of resistors in commercial packaging; fix and maintain uniform prices for the sale of resistors in military packaging, and to require certain distributors to adhere to the prices fixed and agreed upon in sales to the armed forces.

If convicted under the indictment each defendant faces maximum penalty of one year in prison, a fine of $50,000 or both under federal law (15 U. S. C. 1).

The companion civil complaint charges practices identical with those alleged in the indictment.

The civil complaint seeks injunctive relief against continuation of the practices and to require the companies to re-establish new price lists based on their individual costs and judgment.

The Government also asks the court to order the defendants to submit sworn affidavits of non-collusion to public agencies to whom bids are submitted, and to enjoin defendants from communicating to any other manufacturer any information concerning future bids to governmental bodies.

U. S. v. *General Cable Corp.* (U. S. D. C. S. D. N. Y., Complaint, Jan. 19, 1961).

Attorney General William P. Rogers announced the filing of a civil antitrust complaint in United States District Court at New York charging the General Cable Corporation with violating Section 7 of the Clayton Act through acquisition of nine corporations engaged in phases of the wire and cable industry or related activities.

The Government challenged the acquisitions on grounds the actions may have the effect of substantially lessening competition in the manufacture, distribution and sale of electrical wires and cables.

General Cable is primarily engaged in the manufacture, distribution and sale of copper wire and cable, as well as a major domestic producer of aluminum wire and cable products.

The complaint describes General Cable as the largest producer of copper and aluminum wire and cable in the United States with 1959 assets listed at approximately $130 million and net sales of more than $170 million.

Acquisitions by General Cable since June of 1955, were listed as: General Insulated Wire Works (1955); New England Cable Company, Clifton Conduit Company, Clifton Conduit Company, Inc., Alphaduct Wire & Cable Company (1956); Metal Textile Corporation (1957); Hathaway Patterson Corporation (1958); Cornish Wire, Incorporated and Indiana Steel & Wire Company, Inc. (1959).

The complaint charged effects of the challenged acquisitions include:

> The elimination of actual and potential competition in the electrical wire and cable industry and in the production of other copper products;
>
> The elimination of actual and potential competition between General Cable and some of the acquired companies in the production and sale of electrical wire and cable and other copper products;
>
> The elimination of some of the acquired companies as potential purchasers from competitors of General Cable;
>
> The undue enhancement of General Cable's competitive advantage over other producers of wire and cable; and
>
> Further increase in concentration in the production and sale of wire and cable and various wire and cable products.

The Government asks that General Cable be required to divest the stocks and assets of the corporations unlawfully acquired and be enjoined from acquiring the stock or assets of any corporation engaged in any phase of the electrical wire and cable industry or in mechanical application of wires and cables without approval of the court.

The complaint also seeks court order enjoining the companies unlawfully acquired from purchasing materials from General Cable on other than a freely competitive basis.

U. S. v. *American Smelting and Refining Company* (U. S. D. C. S. D. N. Y., Complaint, Jan. 19, 1961).

Attorney General William P. Rogers announced the filing of a civil antitrust suit in United States District Court in New York charging the American Smelting and Refining Company with violation of Section 7 of the Clayton Act through acquisition of stock of General Cable Corporation and Revere Copper and Brass, Inc.

The three firms were named defendants in a complaint which alleges that the stock acquisitions by American Smelting and Refining have resulted in the actual and potential foreclosure of General Cable and Revere as competitive purchasers of refined copper.

American Smelting was described as the largest domestic smelter and refiner of copper, and a leading producer of copper and other non-ferrous metals. It is the major participant in the recent development of Peruvian ore reserves by the Southern Peru Corporation. The output of the Southern Peru mines, which commenced operations early in 1960, is estimated at over 100 thousand tons annually. According to the complaint, in 1959 American Smelting had assets listed at more than $443 million and net sales of more than $390 million.

General Cable Corporation was listed as one of the largest domestic fabricators of wire and cable, primarily engaged in the manufacture, distribution and sale of copper wire and cable. It is also one of the major domestic producers of aluminum and cable products. In 1959 it had assets listed at approximately $130 million and net sales of more than $170 million.

Revere Copper and Brass is one of the leading domestic fabricators of copper and copper-base alloy mill products. It is also a large fabricator of nickel-silver, aluminum and steel products. In 1959 Revere had assets listed at more than $135 million and net sales of more than $245 million.

The Government charges that commencing in 1927, American Smelting and Refining began to acquire stock in the two fabricating companies and at present controls approximately 30% of the voting stock in General Cable and 35% of the voting stock in Revere.

It is also alleged that both General Cable and Revere purchase substantial amounts of refined copper from American Smelting and Refining.

It was asserted that the business of copper mining, smelting and refining in the United States is highly concentrated, and that this concentration is coupled with a high degree of integration, concentrating the mining, smelting, refining and fabrication of copper and copper-base products in the hands of a few major producers.

According to the complaint, acquisitions of fabricating facilities by the major copper producers have had the effect of placing independent fabricators in the position of having to compete with their own suppliers.

Among effects listed by the complaint as stemming from the alleged practices are:

> The elimination of actual and potential competition in the production and sale of various forms of copper;
>
> The elimination of actual and potential competition in the fabrication and sale of copper wire and cable and copper-base mill products;
>
> The elimination of General Cable and Revere in whole or in part as independent competitive purchasers of refined copper;
>
> The undue enhancement of American Smelting and Refining Company's advantage over other copper producers;
>
> The undue enhancement of the competitive advantages of General Cable and Revere over their independent competitors; and
>
> Fostering of additional acquisitions of copper fabricators by other copper producers with consequent increase in integration and concentration.

The Government pointed out that in the 1950 amendment to Section 7 of the Clayton Act, Congress made it clear that one of the primary purposes of the Act was to prevent the establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

In this case, the court is asked to order American Smelting to divest its stock holdings in General Cable and Revere, and take such further actions as deemed necessary to restore competitive conditions.

The court is also asked to enjoin American Smelting from acquiring stocks or assets of any other corporation engaged in the production, fabrication or sale of copper or copper alloy metals or products.

In addition, the Government asks that Revere and General Cable be enjoined from purchasing refined copper from American Smelting on other than a freely competitive basis.

Federal Trade Commission Activity

F. T. C. v. *Leslie Salt Co.* (FTC Dkt. #8220, Complaint, Jan. 3, 1961).

Leslie Salt Co., San Francisco, Calif., the largest and dominant salt producer on the Pacific Coast, was charged by the Federal Trade Commission with violating the antimerger law in acquiring two competitors.

Challenged in the FTC's complaint are Leslie's acquisitions of The Deseret Salt Co. of Salt Lake City, Utah, and California Salt Co. of Los Angeles, Calif. The former was acquired by Leslie on December 1, 1958. Leslie acquired a two-thirds capital stock interest in the second concern in November 1936 and the remaining interest on January 2, 1958. Subsequently on April 30, 1959, it acquired all assets of California Salt and the concern was dissolved.

The complaint alleges that the mergers violate Section 7 of the Clayton Act, since their effect has been, or may be, substantially to lessen competition or tend toward a monopoly in the production and sale of salt in the western part of the United States.

According to the complaint, Leslie produces evaporated salt by the solar method using sea water from San Francisco Bay. Before acquiring Deseret, the company's evaporated salt capacity was in excess of one million tons annually. During 1958, Leslie ranked second in the nation among producers of evaporated salt and fourth among all salt producers. The company's principal sales areas are the states of California, Washington and Oregon.

Deseret, the complaint says, also produced evaporated salt by the solar method using natural brine obtained from the Great Salt Lake. At the time of its acquisition, the company ranked as the second largest salt producer in Utah, with an annual capacity of approximately 50,000 tons. Its principal sales areas were Washington, Oregon, Utah, Idaho and Colorado.

Prior to 1955, the complaint states, freight rates were such that Utah producers could not market salt economically in Washington and Oregon as their delivered prices were higher than those of California producers. But after a revision in freight rates in 1955, Deseret began competing with Leslie in these two states and continued to compete until the merger. During 1958, for example, Leslie had 90.7% of the evaporated salt market in Washington and 83.5% in Oregon, while Deseret's shares were 2% and 2.1%, respectively.

The complaint charges that the merger has permanently eliminated Deseret in an oligopolistic framework as one of the few alternate sources of supply of evaporated salt in Washington and Oregon and the additional increase in concentration has been, or may be, detrimental to actual or potential competition.

Among other adverse effects of the acquisition cited in the complaint are the following:

> Actual and potential competition between Leslie and Deseret has been, and will be, eliminated in the production and sale of evaporated salt in the Western states, especially in Washington and Oregon;
>
> Actual and potential competition between distributors and jobbers of salt in the Western states, especially in Washington and Oregon, has been, or may be, substantially lessened or eliminated;
>
> Leslie has substantially increased its evaporated salt resources, productive facilities, share of the evaporated salt market in the Western states, and overall position in the salt industry, thus increasing and enhancing its competitive advantage over other salt producers to the detriment of actual or potential competition;
>
> Entry into the salt industry in the Western states, especially on the Great Salt Lake, has been, or may be, discouraged or inhibited to the detriment of actual or potential competition; and
>
> Industry-wide concentration in the production and sale of salt has been substantially increased in the United States and in the Western states.

Regarding the acquisition of California Salt Co., the complaint says that company in 1958 was the largest and dominant producer and shipper of rock salt in Arizona, California and Nevada, account-

ing for approximately 96.2% of all rock salt shipped in those three states.

As a result of the acquisition, the complaint alleges, the largest and dominant producer of evaporated salt in California has combined with the largest and dominant rock salt producer in the state, and the resulting combination has been given a decisive advantage over less diversified competitors.

Other alleged adverse effects are: (1) Potential competition between Leslie and California Salt has been, and will be, permanently eliminated in the production and sale of salt in Arizona, California and Nevada and (2) Entry of other salt producers as significant competitive factors in the salt industry in the three states has been, or may be, discouraged or inhibited, and it has been made difficult for smaller customers in those states to survive and grow.

F. T. C. v. *Dennis Chicken Products Co. and Ball Brothers Co., Inc.* (FTC Dkts. #8091-2, Consent orders, Jan. 9, 1961).

The Federal Trade Commission announced that the following two companies have consented to orders forbidding them to pay discriminatory allowances to favored purchasers of their grocery items: (8091) Dennis Chicken Products Co., Augusta, Ill., a processor of food products, including chicken and turkey, and (8092) Ball Brothers Co., Inc., Muncie, Ind., a manufacturer of glass containers and closures and zinc products.

The Commission affirmed separate initial decisions by Hearing Examiner Loren H. Laughlin based on orders agreed to by the respondents and FTC's Bureau of Litigation.

The concerns were charged in the FTC's complaints of last August 24 with paying some customers advertising allowances which were not made available on proportionally equal terms to all competing customers as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The complaints cited Benner Tea Co., a retail grocery chain with headquarters in Burlington, Iowa, as a typical recipient of these preferential payments.

The orders provide that future payments by respondents must be on a proportionally equal basis only.

F. T. C. v. *Kelly Creamery Co.* (FTC Dkt. #7783, Consent order, Jan. 11, 1961).

The Federal Trade Commission has approved a consent order prohibiting Glen C. Kelly, trading as Kelly Creamery Co., Elk City, Okla., from charging different prices to competing purchasers of his fluid milk and other dairy products.

In a case in which complaint issued last February 15, the Commission adopted an initial decision by Hearing Examiner Loren H. Laughlin based on an order agreed to both by respondent and FTC's Bureau of Litigation.

The complaint alleged Mr. Kelly has charged retailers in certain Texas and New Mexico market areas substantially less than purchasers elsewhere in these two States and in Oklahoma. The price differentials were better than 11¢ per half gallon of fluid milk, the complaint said.

It added that many retailers were charged over 8¢ per half gallon more than competing retail customers.

These price discriminations may substantially lessen competition between Kelly Creamery and its competitors as well as between favored and unfavored retailers in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act, the complaint charged.

The order specifies that Mr. Kelly (1) must charge the same net prices to customers who compete with each other in reselling his products, and (2) may meet, but must not undercut, prices offered customers by other sellers.

F. T. C. v. *H. P. Hood & Sons, Inc., et al.* (FTC Dkt. #8273, Complaint, Jan. 16, 1961).

The Federal Trade Commission announced charges that H. P. Hood & Sons, Inc., the dominant dairy concern in New England, and The Great Atlantic & Pacific Tea Co., Inc., the nation's largest retail food chain, have maintained an unlawful conspiracy in restraint of trade, in the sale of dairy products in New England.

A Commission complaint alleges that ever since February, 1937, Hood and A & P have employed the following unfair methods of competition in furtherance of the conspiracy:

1. Fixed prices;
2. Fixed in-store wholesale and out-of-store retail prices;

3. Charged consumer-purchasers in some areas substantially higher prices than charged consumers elsewhere;

4. Engaged in price wars by charging consumers in some areas substantially less than consumers elsewhere, including sales below cost;

5. Fixed and maintained arbitrary and artificial out-of-store retail prices unrelated to prices paid farmer-producers for raw fluid milk;

6. Coerced Hood's competitors to sell to A & P and its competitors at prices fixed by the two companies, including sales below cost;

7. Denied competitors and potential competitors a reasonable opportunity to compete for A & P's purchases by making preferential payments to the chain;

8. Agreed to and adhered to certain discounts, terms and conditions such as agency commission, agency adjustment, inflation payments, normal list prices, agency prices, and other formula pricing systems on sales to A & P and to the purchasing public;

9. Tended to destroy home delivery competition by increasing the differential between home delivered and out-of-store prices, which diverted sales to retail stores, including those owned by A & P; and

10. Attempted to monopolize the industry in various New England marketing areas.

The complaint charges that these policies and practices have lessened competition in the purchasing, processing, distribution and sale of dairy products, have foreclosed markets and access to markets to competitors and have had other adverse effects; and are all to the prejudice of competitors and the public.

According to the complaint, Hood has its principal office in Boston, Mass., and that of A & P is New York City. Hood sells its dairy and food products at both wholesale and retail through the six New England States of Maine, New Hampshire, Rhode Island, Connecticut, Vermont and Massachusetts, and its annual net sales exceed $160

million. A & P operates retail outlets in these six states and others through fifteen subsidiary corporations. In 1959 A & P's sales were more than $5 billion.

F. T. C. v. *J. Segari and Co., et al.* (FTC Dkt. #8065, Consent order, Jan. 17, 1961).

The Federal Trade Commission has issued a consent order forbidding Elliott W. Sassbender, Sr., and Joseph O. Segari, copartners trading as J. Segari & Co. and Market Place Produce Co., New Orleans, La., from unlawfully receiving brokerage on their own purchases.

The Commission affirmed an initial decision by Hearing Examiner Leon R. Gross based on an order agreed to by the partners and the FTC's Bureau of Litigation.

In its complaint of last August 3, the FTC alleged that the firms accept brokerage or a discount in lieu of brokerage on purchases of citrus fruit for their own account for resale from Florida packers, which is forbidden by Section 2(c) of the amended Clayton Act.

F. T. C. v. *The Graham Co., Inc.* (FTC Dkt. #7994, Consent order, Jan. 27, 1961).

The Graham Co., Inc., New York City, has consented to a Federal Trade Commission order forbidding it to charge different prices to competing purchasers of its dried peas, beans and related products.

The order was agreed to by both the company and the Commission's Bureau of Litigation. It was accepted in an initial decision by Hearing Examiner Edward Creel, which the FTC affirmed.

In its complaint of last June 24, the FTC alleged that under Graham's quantity discount schedule a few larger wholesaler customers are charged substantially less than their smaller competitors. For example, a 5¢ per case discount is given on a purchase of 100 cases of dried peas and beans, 10¢ on 250 cases, and 15¢ on 1,000 cases, the complaint said.

It added that the maximum discounts allowed are based upon quantities so large that they are actually unavailable to some, if not the majority, of the concern's wholesaler-purchasers.

These price discriminations, the complaint charged, may result in a substantial lessening of competition in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

F. T. C. v. *Perfect Equipment Corp.* (FTC Dkt. #7707, Consent order, Jan. 27, 1961).

Perfect Equipment Corp., Kokomo, Ind., is prohibited by a consent order affirmed by the Federal Trade Commission from discriminating in price among competing customers in the sale of automobile repair parts, supplies and tools for replacement purposes.

The order was agreed to by both the company and FTC's Bureau of Litigation. It was accepted in an initial decision by Hearing Examiner Leon R. Gross, which the Commission adopted after striking certain portions of his findings.

The FTC's complaint of Dec. 22, 1959 alleged the concern violated Section 2(a) of the Robinson-Patman Amendment to the Clayton Act by charging some independent jobber customers higher prices than competing independent and group buying jobbers. These specific pricing practices where challenged:

> Under the company's 1956 and 1957 discount schedule (ranging from 2% to 7% dependent on annual purchases), independent jobbers buying in lesser quantities were charged higher net prices than heavier-buying independent competitors.
>
> During the same two years, rebates to jobbers affiliated with buying groups were based on aggregate purchases of all members, resulting in all group jobbers receiving the top 7% rebate regardless of individual purchases.
>
> Under the pricing program in effect since January, 1958, all jobbers who received the 7% discount in 1957 still receive it, although many independents are given no rebate whatever.
>
> In addition, in its 1958 pricing program revision, the company classified many larger independent jobbers and the "group headquarters" maintained by many group jobbers as "Warehouse Distributors," and gives them at least a 20% discount. These customers are not true warehouse distributors because most of them do not resell goods purchased from respondent to other jobbers but resell them in competition with other of its jobber customers, the complaint contended.

These price discriminations, the complaint charged, may substantially lessen competition between the respondents and its competitors as well as between its independent and group jobber customers.

This allegation was dismissed insofar as it relates to respondent's line of commerce.

The order requires Perfect Equipment, in selling these products for replacement purposes, to charge the same net prices to purchasers who compete with each other in reselling or distributing the items. As defined in the order, "purchaser" includes any customer buying directly or indirectly by means of group buying or any related device, but does not include original equipment manufacturers purchasing automotive parts for replacement use or sale.

F. T. C. v. *Timken Roller Bearing Co.* (FTC Dkt. #6504, Order, Feb. 9, 1961).

The Timken Roller Bearing Co., Canton, Ohio, the nation's largest manufacturer and seller of tapered roller bearings, has been ordered by the Federal Trade Commission to stop unlawfully requiring its distributors and jobbers not to handle competitive products in the replacement market.

Issuing its own findings as to the facts and order to cease and desist, the FTC set aside an initial decision by Hearing Examiner William L. Pack, who had held that the evidence fails to establish Timken has an exclusive dealing policy and, for the second time, had ordered dismissal of the complaint, issued Feb. 13, 1956.

[On May 27, 1958, the Commission vacated an earlier dismissal order by the examiner and remanded the case to him for further proceedings.]

The Commission said in an opinion, prepared by Commissioner William C. Kern, that Timken's contracts with distributors and jobbers do not contain "any provision expressly requiring purchasers not to deal in the bearings of respondent's competitors. It is well settled, however, that express written agreements are not needed to prove exclusive dealing."

Finding that documentary evidence obtained from the company's files shows Timken follows a consistent policy of requiring exclusive dealing, the Commission ruled that this requirement may substantially lessen competition or tend to create a monopoly in violation of Section 3 of the Clayton Act.

Cited in the opinion were numerous typical statements, including the following, from salesmen's reports of calls on distributors and

jobbers, correspondence between branch managers and home office officials, and memoranda authorizing cancellation of Timken's agreements with customers:

> "Today I was of course greeted with a very strong bid for a direct appointment and in checking their stock we found approximately $100 worth of new Bower Bearings mixed in with the Timken. This was the first indication that they had bought Bower Bearings in the past five years. * * * He further stated that he made a survey of some of these dealers on the acceptance of Bower Bearings and he found out that they would accept Bower Bearings. He added that for that class of trade, he buys Bower but for his fleet trade and garage type of trade, he will buy Timken. He further added that he knows that we would not countenance that sort of dual buying and it would only be a question of time when we would cancel his contract or put him on direct. * * *" (Commission Exhibit 26A and B.)

> "When this jobber was signed as a Timken contract jobber in April of 1947, his initial stock order was for $354.42. Since that time his purchases have been almost nothing. Reason—he had been buying Bower tapered roller bearings from Ahlberg and now from Federal Mogul.
>
> "We have been patient long enough! Dual distribution is not profitable or worthwhile to us. I suggest we cancel this account as a Timken contract jobber immediately." (Commission Exhibit 158.)

> "* * * Recently, for the reasons outlined in Deen Jones' attached report of March 27, they fell for the Bower warehouse deal due to their close association with the F-M salesman * * *
>
> "I would appreciate your authority to write them the usual cancellation letter * * *" (Commission Exhibit 12.)

The Commission further found that "the varied explanations given by respondent fail to rebut the inference arising from the consistent use by respondent's representatives in all parts of the country, of such

terminology as '100% loyalty,' 'go Timken 100%' and 'We have their assurance' that an account will dispose of a competitor's stock. The hearing examiner's ruling that the correspondence has little probative value is clearly in error."

"From our examination of the entire record," the opinion continued, "we are convinced that it is respondent's policy to sell its tapered roller bearings on the understanding or agreement that purchasers will handle Timken products exclusively; that dealers who contracted with respondent immediately proceeded to rid their shelves of competitive products and replace them with Timken; that respondent policed its dealers for the purpose of assuring adherence to its policy; that reports of deviations were received by the home office; and that those dealers who deviated were cancelled for that reason with the knowledge and authority of the home office. It is obvious that respondent's conduct goes far beyond that of a seller who merely announces a policy and declines to sell to those who do not follow it."

Ruling that Timken's exclusive dealing requirement may have had the adverse competitive effects forbidden by Section 3 of the Clayton Act, the Commission said:

> "The evidence received herein discloses that respondent's sales in the replacement market run between $10,000,000 and $20,000,000 a year; that it has more than 11,000 different items in its line of tapered roller bearings, and that its contracts cover over 7,500 different outlets. Respondent's nearest competitor does a yearly business of between $1,000,000 and $2,000,000 in the sale of tapered roller bearings; has 780 different items in this line; and has 2,000 customers for its tapered roller bearings. The next competitor's sales of tapered roller bearings amount to between $400,000 and $800,000 yearly; it has a mere 586 items in its line, and, at most, 1,000 customers. Thus, it is obvious that respondent is the leading supplier of tapered roller bearings in the replacement market and that a substantial share of that market is affected by its policy of exclusive dealing. That the probable effect of this policy is to substantially lessen competition is thus fully established. * * *
>
> "Moreover, the record supports a finding of actual injury to respondent's competitors, as a result of respondent's exclusive deal-

ing policy. In many instances, competitors' products were on the shelves of distributors and jobbers at the time they entered into a contract with respondent. These dealers then proceeded to dispose of the competitive stock and replace it with Timken exclusively. * * *

"It is evident that as a result of respondent's policy competitors were foreclosed from selling to over 7,500 established dealers in the replacement market."

F. T. C. v. *Rural Gas Service, Inc.* (FTC Dkt. #7065, Init. Dec., Feb. 11, 1961).

A Federal Trade Commission hearing examiner has ruled that FTC trial counsel has failed to prove charges that Rural Gas Service, Inc., Westfield, Mass., a distributor of liquefied petroleum gas in the New England area, and its president George Hammond, have violated the antitrust laws.

Examiner William L. Pack issued an order which would dismiss the FTC's 3-count complaint of February 19, 1958, alleging that the company—

1. Has an exclusive-dealing arrangement with its distributors which may substantially lessen competition or tend to give it a monopoly, in violation of Section 3 of the Clayton Act;

2. Enforces these contracts by unfair methods tending to restrain trade, in violation of Section 5 of the FTC Act;

3. Has violated Section 2(a) of the Robinson-Patman Amendment to the Clayton Act by charging some retail customers substantially higher prices than others.

The examiner pointed out that he had dismissed the price discrimination count in early 1960 because "Admittedly there was no evidence" to support it.

Rural Gas, he continued, sells its liquefied petroleum gas both in bulk and in relatively small interchangeable cylinders. In bulk sales, accounting for 60% of its business, the company delivers the gas in tank trucks to stationary tanks on the consumer's premises. In both bulk and cylinder sales, it loans all of the equipment, including tanks, cylinders, piping and tubing, to the consumer.

Citing various provisions of the contract between Rural Gas and its some 90 distributors, Examiner Pack said, "There is no doubt that an exclusive-dealing arrangement does exist."

However, he ruled, this arrangement does not adversely affect competition. Listing a comparison of the company's sales to total industry sales in the same area from 1953 to 1957, he pointed out:

> "It will thus be seen that respondent's sales accounted for only some 3 percent of the total sales by the industry in the area. And, as already indicated, some 3/5ths of respondent's sales are bulk sales which are made by it direct through its own employees, its distributors being in no way involved. Other evidence establishes that the liquefied petroleum gas industry in the area is highly competitive; that there are numerous sellers, one hundred or more, active in the area; and that a number of these are larger than respondent.
>
> "* * * It is elementary that Section 3 of the Clayton Act forbids exclusive-dealing arrangements only where the effect 'may be to substantially lessen competition or tend to create a monopoly.' Clearly, no such effect has been shown here. In fact, the record establishes the contrary. In order to find a violation of the statute it would be necessary to hold that respondent's contract with its distributors is unlawful per se, a view for which there is no warrant in the statute nor, insofar as the hearing examiner is advised, in any of the adjudicated cases."

Turning to Count II of the complaint, the examiner stated that this attacked a contractual provision forbidding a distributor, for one year after termination of his contract, to engage in the LP-Gas business in the assigned territory.

The examiner said:

> "The validity of covenants of this kind turns upon the question of their reasonableness. Here both the time element (one year) and the geographical limitation (the territory in which the distributor has been selling respondent's product) appear to be reasonable. It must be remembered that respondent has a substantial investment in the equipment loaned to consumers and also that the consumers' contracts are with respondent, not with the distributors. It further appears that while there are exceptions

> (one of which is exemplified by testimony in the present case), usually distributors upon entering into their agreements with respondent are furnished by it with an already-existing supply of customers, that is, consumers who have entered into purchasing agreements with respondent.
>
> "* * * In these circumstances there is merit in respondent's contention that it is entitled to reasonable protection against a distributor who, immediately upon the termination of his relations with respondent, would undertake the sale of a competing product and solicit business from consumers under contract to respondent."

The examiner added that "No illegality is seen in" the challenged contractual provision requiring terminated dealers to turn over to the company any executed consumer agreements on hand.

He noted:

> "Finally, as Count II is based upon the Federal Trade Commission Act, the presence of substantial public interest is an essential element in the proceeding insofar as that count is concerned. In the light of competitive conditions existing in the trade area in question, it seems clear that the requisite public interest is not present. Actually, what the complaint seems to seek to do is to afford relief to respondent's distributors from what the complaint apparently regards as a burdensome and improvident contract. If the contract may properly be so regarded (as to which the hearing examiner expresses no opinion), the matter is essentially a private controversy, not a matter involving the substantial public interest necessary to bring it within the purview of the Federal Trade Commission Act."

Other Court Decisions

United States v. *St. Regis Paper Co.* (C. A. 2d Cir., December 16, 1960).

Copies of the "Census of Manufacturers" which were held in a respondent's files have been held to be subject to an F. T. C. subpoena. The Court said that the purpose of the confidentiality provision of Section 9 of the Census Act is served if the Secretary of Commerce and his staff are denied the power to transmit submitted information to

other governmental agencies or individuals, but there is no reason for further protection. The manufacturer is under no statutory obligation to keep a copy of his report, and if he does so it is no more immune from ordinary discovery procedures than any other document in his possession. It expressly disagrees with the Seventh Circuit's decision on the same issue in *F. T. C.* v. *Dilger.*

Hunt Foods and Industries, Inc. v. *Federal Trade Commission* (C. A. 9th Cir., December 15, 1960).

The Commission has authority under Section 6(a), of the F. T. C. Act to investigate violations of Section 2(a) and (d) of the Clayton Act and Section 5 of the F. T. C. Act. The statutory references to the issuance of a complaint if the F. T. C. has "reason to believe" these sections may have been violated require a determination of the facts, and therefore an investigation. For similar reasons the subpoena power in Section 9 of the F. T. C. Act extends to pre-complaint subpoenas issued in connection with such investigations.

There was specific authority for service by Registered Mail under Section 5(f) of the F. T. C. Act where an investigation and subpoena were concerned with possible violations of both the Clayton and F. T. C. Acts. The court also stated that similar service would be authorized in proceedings under Clayton Act Sections 2(a) and (d) alone.

Alexander Rogers v. *American Can Company, et al.* (U. S. D. C. D. N. J., September 27, 1960).

The bringing of a stockholder's derivative action charging that 8 of 10 directors of the Corporation in which he owns stock and another Corporation violated and are violating the Sherman and Clayton Antitrust Acts to the injury of the Corporation has been upheld against the contentions that the stockholder's Corporation, being named as a defendant, cannot claim that it is injuring itself, and that a stockholder's vote not to bring suit is a bar to the action. The stockholder's Corporation was named as a nominal defendant because it was unable to express its independent will to join as a plaintiff. As to the second contention, the shareholder vote was equivalent to an attempted ratification of the alleged antitrust violations and was not purely an expression of business judgment; therefore, the vote would

not bar the bringing of the action. Also, the attempted application of the rule that stockholders of a Corporation cannot conspire with their Corporation was rejected on the facts of the case.

Rose Container Corp. v. *Atlantic-Vulcan Steel Containers, Inc. and U. S. Hoffman Machinery Corp.* (U. S. D. C. S. D. N. Y., December 16, 1960).

Attempts to restrict the period of time to be covered by depositions failed because the full period of time was likely to be relevant, and some items were struck because the plaintiff was not entitled to inquire into "each and every" phase of the defendant's operations in fields unrelated to that in which it claimed to have been damaged. Other deposition items were also struck for being too broad.

The Singer Manufacturing Co. v. *Brother International Corp.* (U. S. D. C. S. D. N. Y., December 29, 1960).

Interrogatories asking domestic and foreign sales and price information would be premature if related only to question of damages, but are not true "trade secrets" and were permitted because directly pertinent to monopolization charged in general terms.

Armour Research Foundation, etc. and Minnesota Mining and Mfg. Co. v. *C. K. Williams and Co., Inc.* (C. A. 7th Cir., July 12, 1960).

The trial court's decision, in a patent infringement action in which the antitrust violations were alleged, that there had not been price-fixing, patent-pooling, cross-licensing, or other patent misuse, or a violation of the antitrust laws, had to be accepted by the instant court as there was credible evidence to support the findings even though there was considerable evidence which would have justified contrary findings. Petitions for rehearing were denied but the issue of Counterclaim costs were deferred to the trial court.

State of Minnesota v. *Applebaums Food Markets, Inc.* (Sup. Ct. Minn., December 23, 1960).

A prima facie showing of a violation of the Minnesota Unfair Trade Practices Act which would have justified a permanent injunction, if proved on trial, must be made before a temporary injunction can be justified. The Court refused to adopt the "so-called doctrine of incipiency," under which an injunction could issue on the threat or possibility of an injury to competition.

Legislation

PROPOSED CONGRESSIONAL LEGISLATION RELATING TO TRADE REGULATION 87TH CONGRESS, 1ST SESSION

SHERMAN ACT*

To ban from office corporate officers "convicted" of antitrust violations	Thompson	HR-4176
Prior publication of consent decrees	Multer	HR-836

CLAYTON ACT

Section 1

To make Section 3 of Robinson-Patman Act an "antitrust law"	Patman	HR-125

Section 2(a)

Sales to Government covered by Robinson-Patman Act	Keogh	HR-430
	Rogers (Colo.)	HR-3465
Mandatory functional discounts	Morris	HR-4151

Section 2(b)

"Good Faith" defense limited	Kefauver	S-11
	Patman	HR-11
	Rogers (Colo.)	HR-136
	Lesinski	HR-442
	Zablocki	HR-597
"Good Faith" defense complete	Walter	HR-839

Sections 2(d), (e) and (f)

To make unlawful under (f) the receipt of anything prohibited by (a), (d) or (e)	Patman	HR-123

* Except where otherwise indicated, all Sherman and Clayton Act proposals were directed to the Judiciary Committees of the respective Houses.

Section 4

Private suits impressed with public interest	Multer	HR-839
Discretionary double damages	Walter	HR-190
4-Year limit on all Section 4 and 4(a) actions	Multer	HR-838

Section 6

Repeal certain labor exemptions	Hiestand	HR-389[1]

Section 7

Premerger Notification	Kefauver	S-166
	Celler	HR-2882
	Patman	HR-3563
To control expansion of branch banks	Celler	HR-745[2]

Section 8

Interlocking ban extended to officers	Celler	HR-73

Other

Establish standard for Government advisory groups	Celler	HR-72
Civil Investigative Demand	Kefauver	S-167

FEDERAL TRADE COMMISSION ACT*

National Fair Trade Law	Madden	HR-116
Treble damages for sales at "unreasonably low prices" and Sec. 3 Robinson-Patman Act violations	Patman	HR-127
	Rogers (Colo.)	HR-143
	Lesinski	HR-1180

[1] Companion bill (HR-228) sent to House Comm. on Education and Labor.

[2] House Comm. on Banking and Currency.

* Except where otherwise indicated, all FTC Act proposals were referred to the Commerce Committees of the respective Houses.

	Multer	HR-1210
	Steed	HR-1833
	Dorn	HR-2759
	Montoya	HR-3308
	Rogers (Colo.)	HR-3574
	Roosevelt	HR-4009
	Morris	HR-4150
Temporary Cease and Desist Orders	Rogers (Colo.)	HR-145
	Lesinski	HR-1181
	Steed	HR-1233
	Patman	HR-1817
	Roosevelt	HR-4008
Inapplicability of antitrust laws to certain aspects of designated pro. team sports[3]	Kefauver	S-168
	Walter	HR-178
	Byrnes (Wisc.)	HR-323
	Collier	HR-1147
To permit auto manufacturers to forbid sales outside specified zone	Multer	HR-1212
To expand jurisdiction of FTC	Mahon	HR-2261[4]

Other Laws

Webb Pomerene Act—Restriction re foreign buyers	Multer	HR-515
Agric. Adjust. Act of 1933 / Agric. Mark. Act of 1937	Ullman	HR-1106[6]
Internal Revenue Code—Nonrecognition of gain on stock distribution per decree	Ullman	HR-1123[7]

[3] All proposals referred to Judiciary Committee.

[4] Judiciary Committee.

[5] Judiciary Committee.

[6] Agriculture Committee.

[7] Ways & Means Committee.

Packers and Stockyards Act of 1921	Anfuso	HR-3415[8]
	Roosevelt	HR-3798

MISCELLANEOUS

Auto. Fin. & Ins. Act of 1961[9]—Limit activities of auto. manufacturers	Celler	HR-71
	Multer	HR-783
Unfair Sales Act of D of C[10]	Anfuso	HR-3223

[8] Agriculture Committee.

[9] Judiciary Committee.

[10] District of Columbia Committee.

BOOK REVIEW

Neuner, Edward J., *The Natural Gas Industry: Monopoly and Competition in Field Markets.* Norman: University of Oklahoma Press, 1960, pp. xx-302, $5.75.

In the introduction to his book Professor Neuner states that his major purpose is to determine whether concentration of ownership of natural gas reserves, or monopolistic market control of field sales is sufficient to justify public regulation of field prices.

This is an important issue. It has been explored in the thousands of pages of Congressional hearings on proposed revisions of the Natural Gas Act, in testimony by economists before the Federal Power Commission, in articles in economic journals, and in at least one other book. Neuner's doctoral dissertation was a pioneer effort to classify, on the basis of a careful examination of 723 gas purchase contracts negotiated during the period 1944-1953, market structure and performance in the supply of natural gas. It is disappointing that in revising his dissertation, Neuner made no pretense to up-dating the earlier material. He does not mention the extensive testimony on purchase contracts developed in many post-1953 proceedings before the Federal Power Commission, which provide volume and other information lacking to him. Nor does he refer to the divergent interpretation of these data presented by economists—perhaps irrelevantly to the immediate issues of rate determination—in numerous cases. It must be concluded that the former omission at least was intentional. Neuner must have assumed that the characteristics of the natural gas market in March, 1960, when his preface was written, were substantially identical with those of the 1944-1953 market. Yet there is good reason to believe that there have been changes of a significant nature in that market. "Take-or-pay" clauses, which Neuner never mentions, have become conventional. Certain bargaining situations, such as that leading to the notorious CATC contract, have strongly suggested superior strength on the part of sellers, while the pipelines have been obviously indifferent to price increases proposed by suppliers in certificate and rate revision cases before the FPC. Yet, according to Neuner "(i)t seems quite improbable that a pipe line would disregard its own interest in maintaining low supply costs" (p. 263).

At the outset Neuner presents 1953 national data on both concentration of ownership of reserves and sales by independent producers to interstate pipelines. Sales concentration in various sub- or regional markets are also computed. In his analysis of market behavior, Neuner draws on the contracts to compute average annual price levels in the field and to outline prevailing pricing practices, such as escalation, favored-nation and price redetermination clauses. Some 90 pages are devoted to historical reviews of new contracts in 7 gas supply areas. In southwest Louisiana, for instance, analysis of the purchase contracts showed that there were 47 sellers and 9 purchasers. Large-volume contracts from 1948 (when buying first began) through 1951 showed no uniformity in price or term. "By this standard, there was little or no evidence of non-competitive behavior in the group of market transactions examined" (p. 186). During 1952 and 1953 two large buyers entered southwest Louisiana and contracts were negotiated that provided for an average (unweighted) price of 25 cents over the life of the contract, more than double the average price fixed in contracts through 1951.

Neuner's conclusions regarding concentration parallel those of Dr. Boatwright in his testimony in 1955 before the House Interstate and Foreign Commerce Committee. The level in production is "not excessive by comparison with manufacturing industry" (p. 245), and 25 producers accounted for only 50-60 percent of sales or reserve holdings. Even though concentration was somewhat higher in the regional supply areas, it "is not sufficient to warrant an extended system of price control" (p. 251).

On the basis of his survey of field market transactions in each regional supply area, Neuner concludes that such contract uniformity as did appear "was clearly buyer-determined" (p. 260). Inter-supply area price differences were not such as to warrant inference of collusion among producers, and Neuner points out that the producers who in 1949 accepted 9¢ per MCF did not benefit from the 18¢ price received by those who waited three years to make reserves available. (In computing average prices prevailing for the length of the contract, Neuner did not apply a discount factor.)

After a penetrating consideration of the economics of typical pricing clauses, Neuner concludes that the pressure for long-term contracts has come from the pipeline buyers, who could not otherwise be certificated or obtain financing. The favored-nation clauses he regards as

merely "part of the going price structure" (p. 269). If most producers in any area were receiving them, any particular seller would insist on the same or better. Moreover, producers would be willing to trade them for price increases. Since the supply areas to which the clauses applied were not uniformly delimited, he concludes that they could not have been collusively adopted by sellers.

When he comes to examine the monopolistic potential of combining most-favored nation clauses with the removal of supply from the market by long-term contracts, Neuner finds that "Louisiana Gulf Coast supply areas—where most of the uncommitted reserves were found—recorded a considerable price premium for large volume gas. In contrast, price levels for other supply areas were substantially below the Louisiana Gulf Coast level . . ." (p. 277). Nevertheless, taken alone, most-favored nation clauses would result in monopolistic price leadership only to the extent supply options were not available outside the applicable areas; whereas, such options were, as a matter of fact, open to buyers, according to Neuner.

Although he fails to find that concentration of reserves need cause concern, Neuner does regard the typing up of reserves through long-term contracts as objectionable, since it unduly restricts the supply of gas available to satisfy new demand. His reform proposals accordingly center about restoring to the supply side of the market for natural gas the reserves presently committed by long-term contracts. An organized spot market for gas, or, at least, substitution of one- or two-year contracts for the 15- and 20-year terms now prevailing would relieve the pressure on the constantly diminishing supply of uncommitted reserves. At the same time, to prevent excessive commitments, it would be necessary for the FPC to certificate new pipelines only to the extent their demands would not exhaust reserves. As Neuner recognizes, this would require the FPC to pay more attention than it has up to now to national demand trend, and the adequacy of total reserves. But he does not appear to be aware of the difficulties of relating a varying market price to the rate of exploration and development. While buyer immobility, reflected in high exit costs of pipelines already constructed, might justify price control, even if long-term contracts were eliminated, Neuner doubts whether if this alone were the expense for regulation, the benefits would exceed the social costs of such regulation.

With Neuner's conclusion that his data show nothing to support a hypothesis of collusive monopoly in either natural gas field pricing or market structure one can have little quarrel. His patient review, single-handed, of a staggering number of complex contracts is a model of patience and systematic organization, illuminated by a careful and penetrating exposition of how monopoly criteria can be applied under varying conditions of discontinuous cost functions, contract restraints and limitations on reserve availability.

I am unable, however, to accept as a necessary corollary of the absence of collusive monopoly, the presence of workable competition, particularly in view of the developments in the industry since 1953. Regrettably, Neuner does not appear to have realized his avowed purpose of determining once and for all whether field price controls are justified by market conditions. Hence, it is impossible to agree that the only major policy question in natural gas which needs further study is the desirability of appropriating economic rent for consumers.

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Corwin D. Edwards, *The Price Discrimination Law—A Review of Experience,* Washington, D. C.: The Brookings Institution, (1959), pp. xxii, 698. $10.00.

Mr. Edwards' comprehensive examination and appraisal of the functioning of the Robinson-Patman Act is a welcome addition to the small but growing shelf of judicious writings in the antitrust field by eminently qualified scholars. Brookings Institution assigned the task to economist Corwin Edwards, Professor of Government and Business at the University of Chicago since 1955, previously with the Federal Trade Commission and the Antitrust Division.

Despite its size, the volume does not attempt to summarize or review the voluminous (mainly legal), secondary literature which has grown up around the law[1] though some articles and books are occasionally referred to. Instead the main sources are the 311 F. T. C. decisions rendered before 1958, the underlying public records, related

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1 Federal Trade Commission, Twenty Years of Robinson-Patman Act Literature 1936-56 (Special Reference List No. 4, Revised October, 1957).

court cases, and Congressional hearings. Field interviews conducted to follow up 84 cases decided before 1955 where at least two interested parties were available, *e.g.*, seller vs. buyer, proved disappointing, but served to supplement and clarify the public record in these cases. Perhaps the most interesting feature of the study is the effort to trace alterations in respondents' business practices resulting from litigation.

Considerable detail is devoted to almost every aspect of the 1936 law: discounts, brokerage, proportional allowances and services, delivered pricing, miscellaneous forms of discrimination, competitive injury, the cost defense, good faith meeting of competition, and the quantity limits proviso. Only the "changing conditions" exemption of Section 2(a) receives cursory treatment (p. 474).[2] A more extended discussion of the economic concept of price discrimination would have been appropriate for such a volume, even though given scant recognition in the law. Chapters tracing the legislative history of the act, and reviewing the over-all record of F. T. C. enforcement afford valuable perspective.

In an area where strong opinions abound, especially in light of a highly controversial statute, Edwards is admirably objective. He considers his conclusions as no more than tentative. An example of his objectivity is the following quote: "The law has afforded effective protection against the price cutting activities of predatory would-be monopolists and . . . has substantially reduced the discriminatory advantages in price enjoyed by large buyers" (p. 622). At the same time there has been a reduction in the vigor of competition and the flexibility of prices. He indicates that the 1936 statute encouraged vertical integration without offering supporting evidence. In the case of the A & P, sales of its own products shrank from 15% of total sales in 1940 to 11% in 1958 (p. 110).

Most disagreement will center around the author's appraisal of the law and his proposals for its improvement. Professor Edwards occupies a middle position between those who frown upon all price differences and those who would leave the pricing process completely unhampered, regardless of the existence of oligopolistic or monopsonistic market relationships. In purely competitive markets, price

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[2] *Cf.* the ***Report of the Attorney-General's National Committee to Study the Antitrust Laws*** (Washington, 1955), pp. 177-79.

discrimination (defined by the economist as prices disproportionate to costs) could not exist. In a workably competitive economy, on the other hand, "some forms and degrees of discrimination" have a place, J. M. Clark suggested in a famous article some years ago.[3] More recently the Attorney General's National Committee considered some discrimination (as defined by economists) "an inevitable part of the business scene." [4]

Legislation protecting sellers from discrimination injurious to competition in the primary line is needed, but the application of a test of narrow types of injury reduces sellers' competition, Edwards feels. If the F. T. C. concentrated on *powerful* buyers in its efforts to arrest incipient injuries to competition among buyers there would be a significant diminution in the number of cases. The law should be amended to permit an evaluation of "the effects in the primary and secondary lines in order to make sure that the accomplishments in the secondary line are not obtained at too great a cost of adverse effects in the primary line" (p. 643). Edwards is convinced that the preservation of equality of opportunity, one of the major goals of the Robinson-Patman Act, is not an appropriate objective of a price discrimination law: Section 2 of Clayton cannot satisfactorily compensate for inadequate enforcement of Clayton's Section 7 and Sherman's Section 2. If Congress nevertheless wishes to include equality of opportunity among the objectives of the law, it should focus on defining and forbidding activities of powerful buyers likely to injure market competition.

Certain critics have condemned the act as concerned mainly with protecting competitors rather than competition. Edwards retorts that the law deals with injury suffered by classes or groups of competitors (p. 521). In an earlier passage he himself noted that even where market competition remained vigorous and a seller was replaced by another, discrimination that drove a competing seller out of business might be found injurious to competition under the terms of the 1936 law (p. 57). Nor is Edwards' interpretation supported by the House and Senate reports on the 1936 bill which called the 1914 provision

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3 John Maurice Clark, "Toward a Concept of Workable Competition," 30 *American Economic Review* 241, 250.

4 *Loc. cit.*, p. 335.

inadequate and stressed that "the more immediately important concern is in injury to the competitor victimized by the discrimination." [5]

Edwards feels it is inappropriate for a price discrimination law to limit selective payments and services where sales effort and not a price reduction is involved. The brokerage provision and the criminal penalties are likewise out of place. These are similar to recommendations of the Committee on Cartels and Monopolies of the Twentieth Century Fund. A majority of the Attorney General's Committee (1955), urged the elimination of criminal penalties, but wished merely to restore the "services rendered" exception in the brokerage provision and sought reinterpretation of the allowances and services sections to reconcile them with "broader antitrust objectives." [6]

The good faith defense is still being debated in Congress.[7] Edwards wants to give sellers freedom of action by interpreting injury to sellers' competition realistically rather than by resorting to the meeting competition defense. This defense should not be available where competition is "actually endangered" (p. 649). Where good faith has been demonstrated, the discriminatory practice should be prohibited only where it "prevented more damage to competition than it caused" (p. 655).

One who shares Edwards' conviction that the brokerage provision should be repealed, may nevertheless disagree with the undocumented statement that it was included because Congress wanted to halt payments received by a few large food chains "and was afraid that these payments could be cost-justified" (p. 645). Much simpler is the explanation that Congress wished to eliminate price discriminations which might be concealed in this guise.[8]

Edwards criticizes not only the substance of the law, but its enforcement as well. Three-fifths of all F. T. C. orders have concerned the food industries; even if brokerage orders are excluded, food still leads with 34% of the total. Outside this area, industries with a disorderly price structure (auto parts, rubber stamps) have received

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[5] 74th Cong., 2d Sess., House Report 2287, p. 8; Senate Report 1502, p. 4.

[6] George Stocking and Myron Watkins, *Monopoly or Free Enterprise* (New York, 1951), p. 561; *Report of the Attorney-General's Committee,* p. 193.

[7] 1959 bills included S. 11 and H. 11 (Patman, Kefauver); S. 138 (Capehart).

[8] Joseph C. Palamountain, Jr., *The Politics of Distribution* (Cambridge, 1955), pp. 203-4, 231.

a great deal of attention despite the vigor of competition on both sides of the market. Were the F. T. C. to prosecute those discriminations most likely to lead to monopoly, a significantly different pattern would emerge, he suggests.

The discussion of the effects of the F. T. C.'s orders on price movements is tantalizingly brief. Prices have moved up in some cases and down in others. Carefully marshalled evidence which would throw light on the forces leading to one or the other result in a given situation is regrettably absent. Perhaps such evidence is unavailable—another illustration of the difficulties besetting the investigator in this field in which unsupported generalizations abound.

To understand the material, no technical economic background is necessary. A deservedly wide audience among antitrust practitioners, students, and policy makers is to be expected for this volume. Congress might well use this study as the point of departure in attempting to improve the 1936 law.

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